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CONSTITUTIONALITY OF GAO'S BID PROTEST FUNCTION

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HEARINGS

BEFORE A
SUBCOMMITTEE OF THE
COMMITTEE ON
GOVERNMENT OPERATIONS
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

FEBRUARY 28 AND MARCH 7, 1985

Printed for the use of the Committee on Government Operations

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CONSTITUTIONALITY OF GAO'S BID PROTEST FUNCTION

THURSDAY, FEBRUARY 28, 1985

HOUSE OF REPRESENTATIVES,
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Frank Horton, and David S. Monson.

Subcommittee staff present: Richard C. Barnes, staff director; Mary Alice Oliver, clerk; full committee staff: William M. Jones, general counsel; John E. Moore, staff administrator; James E. Lewin, chief investigator; James E. Rife, Charles C. Wheeler, R. Michael Long, and Robert S. Richard, professional staff members; Ralph Doty, and Judge Williams, staff members; Stephen M. Daniels, minority staff director and counsel; Douglas D. Mitchell and John Parisi, minority professional staff, Committee on Government Operations.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. BROOKS. The subcommittee will come to order.

Today we will begin our hearings on the constitutionality of GAO's bid protest function.

Last year, after much work by this committee and others, Congress enacted the Competition in Contracting Act, Public Law 98-369. This statute is widely regarded as the first major piece of procurement reform legislation passed by the Congress in over 40 years.

The Competition Act requires Federal agencies to open up their bidding process to all qualified firms wishing to compete for the Government's business. It also establishes, for the first time in statute, a forum in which contractors can appeal to the General Accounting Office when they have been unlawfully denied the opportunity to compete.

During our deliberations on this legislation, we received considerable opposition to these reforms, reasonable though they are, from executive branch agencies. Apparently, high level officials, both within the Defense Department and some of the civilian agencies, thought it was their right to regularly award sweetheart contracts to their favored sole-source suppliers. In passing this act, Congress

firmly rejected this notion, and, in my view, the American taxpayer will be the ultimate winner.

Clearly, the statutory requirements mandating the use of full and open competition will significantly lower the prices the Government pays for everything from claw hammers to nuclear submarines. Unfortunately, because of the actions taken by the executive, it may be a while before these savings can be achieved.

The President, on signing the competition bill into law, declared certain key provisions dealing with GAO's bid protest function to be unconstitutional. And that has no standing in court whatsoever. Subsequently, the Justice Department and OMB directed executive agencies not to comply with these provisions. Mr. Stockman even went so far as to order Federal officials to willfully violate the law.

It has always been my impression that there are the legislative, the executive, and the judicial branches of Government; and it was the judicial branch that declared laws, actions to be unconstitutional, not the executive. Now, if we are going to change that, we ought to abolish the Supreme Court and move it down to the White House, and then the President could say a law is constitutional or not. But do we want to try all of our cases down there?

In my opinion, these actions are unprecedented in the history of our Government. The Competition in Contracting Act was duly enacted by Congress and signed into law by President Reagan in accordance with constitutional requirements. It is the law of the land. Absent a judicial determination on the provisions in question, it is the responsibility of Government officials to comply with the statute in its entirety.

Nobody asked these officials or even care what they think about the law's constitutionality. The President is the determining factor in that—not the OMB nor the Justice Department. If they don't like it, if they think it is wrong, they can sue in court. They can pick their venue and take their case to court, and prove whatever they can before the courts of this country.

I don't decide whether the law is constitutional or not. I think that it is, but I don't make that decision. The courts will make that decision. Until they do, as long as it was signed into law and duly passed by Congress, it is the law of this country. We don't individually decide whether we think a law is constitutional or not. If you don't like to pay your taxes, say it is unconstitutional like those that don't pay them; and let's see if they don't haul you off and put you in the clink.

I will just say that the President has chosen to do otherwise, and as a result, he has failed to exercise his constitutional duty to take care that the laws be faithfully executed.

The OMB Director and the Attorney General were requested to testify today. David Stockman has refused to appear. The Justice Department was initially uncooperative. Under normal circumstances, I would move today to force the appearance of the Director before the subcommittee. But, in part, due to Mr. Stockman's recent illness, I have rescheduled both OMB and the Department's testimony for March 7.

I would hope that Mr. Stockman is well enough to appear at that time, and will take this time to reconsider his position.

We can now proceed with the hearing.

Mr. Horton, do you have an opening statement?

Mr. HORTON. Yes, Mr. Chairman.

Thank you, Mr. Chairman.

I commend you on moving quickly to hold hearings on the serious issues that have been raised since passage last year of the Competition in Contracting Act. And I would agree with you: I think that this is a very serious constitutional question, a very serious matter that results from the action taken by the executive branch with regard to the declaration that certain provisions of this act were not constitutional, and to the subsequent steps directly ordering agencies not to comply.

It is regrettable, of course, that the executive branch's reservations about constitutionality have clouded the prospects for implementing the bid protest provisions, which lie at the heart of the reforms enacted in CICA. It is regrettable, further, that the executive has taken objection to the bid protest provisions through a procedure which assaults our own sense of constitutionality.

Obviously, I would rather not have to raise these concerns, but in view of the sequence of events you have outlined, it is incumbent upon us to do so.

It is a pleasure to welcome our distinguished witnesses today. Some of them gave valuable testimony last March, on the need for improving competitive practices in Government procurement, and on the need for fair and equitable relief to contractors who are unfairly denied the benefits of competition. One of my questions to our witnesses then was, "Would authorizing and expanding the General Accounting Office's bid protest system make agencies adhere more fully to principles of good procurement?" And the clear answer was, uniformly, "yes."

I am convinced that the approach we took in CICA is not only the most constructive in practice but also constitutionally sound. Even if I were not convinced about the correctness of our action, though, I would be greatly concerned about a philosophy that executive branch officials can determine which laws to carry out, and which they can ignore. The way I've always read the Constitution, the executive must carry out each and every law except those that the judiciary finds unconstitutional.

I hope the testimony we receive today will be helpful in getting the executive branch to reconsider its decision on these matters, and to implement the bid protest law.

And I might add that I think the bid protest mechanism that we provided in that legislation last year is very important, and a very important key to assuring competition. If the Comptroller General does not have the role that we gave him in that legislation, we might just as well throw the whole thing out, because it is meaningless.

So, I think it is very important that we have this testimony. And I would agree with the chairman: I hope that the Attorney General and the Director of the Office of Management and Budget will see fit to appear before us next week so that we can have their views on this very important question.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you, Mr. Horton.

I will now put into the record the statement of Senator William S. Cohen, a very able Republican from Maine, who previously served in the House of Representatives; and Senator Carl Levin, the distinguished Democratic Senator from the State of Michigan.

I will put their statement in the record at this point, and I would just like to observe that they very clearly supported the legislation. They also very clearly think that this is an arbitrary ruling of unconstitutionality by the President and the Attorney General which in their minds is uncalled for, unjustified, and illegal.

They say, "Not only do we believe the CICA's bid protest provisions are constitutional, but we also believe that it is incumbent upon the executive branch to follow the law. Surely such controversial and difficult constitutional issues should be decided after the presentation of divergent views in the courts, not within the confines of the Justice Department. In this regard, we wholeheartedly agree with Representative Peter Rodino, Chairman of the House Judiciary Committee, who recently stated in a letter to the Attorney General that 'until a judicial determination on the constitutionality of a statute, it is the responsibility of government officials, no less than average citizens, to comply with that statute.'"

[See appendix B.]

Mr. BROOKS. We will now hear from our first witness, Mr. Charles A. Bowsher, Comptroller General of the United States, accompanied by Milt Socolar, Special Assistant to the Comptroller General; and Harry Van Cleve, general counsel.

It is good to have you gentlemen with us again.

And, General, your prepared statement will be made part of the printed hearing record, and I wish you would proceed as you see fit.

STATEMENT OF CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, ACCOMPANIED BY MILTON J. SOCOLAR, SPECIAL ASSISTANT TO THE COMPTROLLER GENERAL, AND HARRY R. VAN CLEVE, GENERAL COUNSEL

Mr. BOWSHER. Thank you very much, Mr. Chairman, and members of the subcommittee.

My statement is not too long today; and, because of the importance of the issue, I would like to read it in its entirety.

We are pleased to appear here today to discuss the position of the President and the Department of Justice that two provisions of the Competition in Contracting Act, Public Law 98-369, are unconstitutional, and the action of the executive branch in not executing the two provisions.

The challenged provisions are included within the "procurement protest system" established by section 2741 of the act. Both represent additions to the bid protest procedures formerly conducted by the General Accounting Office, and are designed to make bid protests a more effective mechanism for enhancing competition. The first requires agencies in many cases to suspend or stay a protested procurement action until the Comptroller General issues a decision on the protest.

The second authorizes us to award attorneys fees, as well as bid and proposal preparation costs.

We strongly disagree with the opinion of the Attorney General that these provisions of the act are unconstitutional. The Attorney General's view is that the act violates the separation of powers doctrine by authorizing the Comptroller General both to lift the suspension of procurement action by issuing a protest decision, and also to award costs. According to the Attorney General, the Comptroller General is solely an agent of the Congress and can, therefore, only perform those functions that the Congress may delegate to its committees. The Attorney General's opinion is premised upon an erroneous understanding of the nature of the Office of the Comptroller General and the authority which he may exercise. The Attorney General's opinion is also based upon a misunderstanding of the operation of the protest system established by the act, and its effect upon executive branch operations.

We also believe that, in this case, it is the President who has violated the separation of powers doctrine by defying a duly passed act of the Congress, through the actions of the Attorney General and the Director of OMB.

Now, before addressing the Attorney General's view in more detail, I think it would be useful to indicate briefly why the disputed provisions were passed. An interested party may protest a violation of a procurement statute or regulation to the Comptroller General. Section 2741 of the Competition in Contracting Act codifies and strengthens the bid protest system which has been operated by the General Accounting Office for over 60 years, ever since GAO was established.

In order to ensure prompt resolution of protests, the act provides deadlines designed to achieve a decision within 90 working days.

Also, the act requires agencies to suspend protested procurement actions pending the Comptroller General's decision, except when an agency determines that urgent and compelling circumstances which significantly affect the interests of the United States will not permit waiting.

Finally, in order to provide some meaningful relief to protesters in cases where remedial procurement action is not practical, GAO has awarded bid and proposal preparation costs in appropriate cases. The act expands this relief by providing that the Comptroller General may award to successful protesters their costs of pursuing a protest as well as the traditionally awarded bid and proposal costs.

The act carefully balances public interests. Prospective contractors have an inexpensive and expeditious forum in which their claims of illegal exclusion from the Government's business may be heard. The existence of a forum for such claims, made much more effective by the stay of contract performance in many cases, will, as the Congress intended, help ensure that the agencies comply with the mandate of full and open competition. At the same time, provision is made to eliminate interruptions in meeting the Federal Government's pressing needs for goods and services in appropriate cases.

Now, let me turn to the objections of the Attorney General.

On November 21, the Attorney General informed the Congress of his decision that the Federal agencies should not execute two provisions of the new protest system. The Attorney General argues that

the Comptroller General is solely an agent of the Congress, and, as such, he may only perform the functions which the Congress may delegate to a committee.

In support of his contention, the Attorney General points to two reorganization acts which describe the Comptroller General as being "a part of the legislative branch," and to the Accounting and Auditing Act of 1950 which describes the Comptroller General as "an agent of the Congress."

The Attorney General also points to statutory limitations on the President's power to remove the Comptroller General as being significant.

In the Attorney General's view, the Comptroller General may not take any action which binds individuals and institutions outside of the legislative branch. To do so would be to perform an executive function. This includes the Comptroller General's statutory authority to lift the stay of procurement actions by issuing a protest decision, which the Attorney General characterizes as "the power to dictate when a procurement may proceed." It also includes the award of the costs of pursuing a protest and bid and proposal preparation costs.

Now, I am firmly of the view that the Comptroller General of the United States is not solely an agent of the Congress, but rather serves as an officer of the United States. As such, the Comptroller General may exercise the authority given him under the Competition in Contracting Act wholly consistent with the Constitution.

Since creation of the Office of the Comptroller General in 1921, Comptrollers General have performed a variety of duties to serve the needs of the Congress. Such activities include our traditional audit reports, staff papers and studies, our responses to requests for views on proposed legislation, and legal opinions on matters which do not involve our account settlement responsibilities.

Other responsibilities affect directly the executive branch agencies and provide assurance that funds are fully and accurately accounted for and expended in a manner authorized by law. One example is the Comptroller General's responsibility to audit and settle accounts. Another is the settlement and adjustment of claims by and against the United States. And still another is the issuance of Governmentwide accounting internal control standards.

However these various functions may be classified, one aspect of the Office of the Comptroller General is clear. The Comptroller General by statute is, in fact, appointed in the manner provided by the Constitution for appointment of officers of the United States. It is true that once appointed by the President after Senate confirmation he does not serve at the pleasure of the President but, rather, serves for a fixed term of 15 years.

The Attorney General argues that the security of the Comptroller General from removal by the President necessarily renders him a part of the legislature. Yet, there are other officers of the United States for whom Presidential removal is significantly circumscribed without affecting their status. And the fact is that the Comptroller General cannot be removed at the whim of the Congress either. The Congress can remove the Comptroller General by joint resolution, which requires a majority vote of both Chambers and the signature of the President, but only after notice and hearing and only

for one or more of the five specified reasons: permanent disability, inefficiency, neglect of duty, malfeasance, or conduct which is felonious or involves moral turpitude.

Congress can also remove the Comptroller General by impeachment, as it can remove any officer; but again only through lengthy procedures designed to ensure due process and fairness and only for certain limited reasons: treason, bribery, or high crimes and misdemeanors.

In short, the provisions governing removal of the Comptroller General support, rather than contradict, his status as an officer of the United States. This status of the Comptroller General is in no way affected by references in the 1945 and 1949 Reorganization Acts to the General Accounting Office as "a part of the legislative branch of the Government."

By characterizing the Comptroller General, the head of the GAO, as part of the legislative branch, the Congress did nothing more than restrict the ability of the President to place him in a subservient status through the device of a reorganization plan.

In 1932, President Hoover had proposed a transfer of GAO to the Bureau of the Budget. Thereafter, GAO was excluded from Presidential reorganizational authority, including the 1945 and 1949 Reorganization Acts. The Attorney General errs in attributing constitutional significance to statutory classifications of the Comptroller General.

The Comptroller General's entire duty under the Competition in Contracting Act is limited to three basic actions: the issuance of procedural rules; the issuance of recommendations pursuant to specific findings; and the award of costs based upon specified legal determinations. There is no doubt that these are precisely the type of duties that the Comptroller General has exercised since 1921.

Under the act, the Comptroller General is required to give advisory opinions regarding the legality of procurement actions which will presumably bind him in the audit and settlement of accounts, just as he has always done under his account settlement authority. He is empowered to award bid and proposal preparation costs and the costs of pursuing protests, just as he traditionally granted bid and proposal costs under his claims settlement authority.

The Attorney General argues that the authority to award costs and the stay provisions of the act involve the exercise powers which can only be exercised by an officer under direct control of the President.

Certainly, there are officials whose purely executive jobs are so related to the President's constitutional duties that operation of our form of government requires the official to be directly responsible to the President. However, the award of costs to protesters cannot reasonably be viewed as requiring the President to have direct control over the official who performs the function.

The authority to award costs based upon a determination that a procurement action violated a statute is not assigned by the Constitution to the President, and exercise of that authority by an officer of the United States cannot reasonably be said to interfere with the President's performance of his constitutional duties.

Similarly, the stay provisions do not place purely executive powers in the hands of the Comptroller General. The act merely

requires the procuring agency, if it can do so consistently with the national interest, to "wait and see" what the Comptroller General recommends before proceeding. The agency is not required to wait at all if it determines that performance would be in the best interest of the United States or that delay would "significantly affect interests of the United States." The stay provisions can hardly be said to involve one branch assuming the power to control another branch. Moreover, the stay provisions cannot "disrupt the proper balance between coordinate branches" or "coerce" the constitutional Office of the President by delaying previously authorized executive action since the stay is only implemented if the executive branch itself finds delay consistent with the interests of the United States.

Finally, we believe that the President, not the Congress, has violated the separation of powers doctrine. Upon signing the act, the President stated that he was instructing the Attorney General to inform executive agencies how to comply with the act consistently with the Constitution. As I have discussed, pursuant to this instruction, the Attorney General directed agencies not to comply with two provisions of the act. The Director of OMB, in turn, issued a bulletin specifically providing the same direction to all executive agencies.

Disobedience of the law is itself a matter of serious constitutional significance. The President's constitutional duty is to "take care that the laws be faithfully executed." We cannot find any justification for the action taken to deliberately avoid the law in this case.

The Competition in Contracting Act imposes few limitations upon executive action in a field long-recognized to be a proper concern of the Congress, contracting by the Federal Government. The disputed stay provision can be avoided by executive agencies when required by the pressing needs of the United States, and the payment of compensation or damages to private claimants cannot reasonably be claimed to have major constitutional significance. The Comptroller General has exercised statutory duties similar to those provided in the act since 1921, and the Attorney General cannot point to one judicial decision holding that those duties violate the separation of powers doctrine. In fact, the absence of decided case law supporting the Attorney General's constitutional opinion is a strong argument that, in this case, the Constitution requires the President to uphold the law.

It is significant that the actions of the Attorney General and the Director of OMB, which constitute lawmaking by the executive branch, were unwarranted based upon the Attorney General's legal opinion. The Attorney General recognized in his opinion the power of the Congress to enact a law providing for a suspension of a procurement for 90 days following a protest. He was only concerned about the Comptroller General's authority to release a suspended procurement by issuing a decision and the authority to delay a procurement for more than 90 days following a protest.

In order for agencies to comply with the law in a manner consistent with the Attorney General's opinion, they need only have been directed not to proceed with a protested procurement action for 90 days even if the Comptroller General issues an earlier decision,

and to end the stay after 90 days if a decision or a satisfactory justification for delay has not been issued by the Comptroller General.

Instead, OMB eliminated a provision of the Competition in Contracting Act that is central to enhancing the ability of the bid protest system to increase full and open competition for contracts.

We do not believe that the Constitution empowers the President and his subordinate officers to undertake this revision of the Competition in Contracting Act.

Mr. BROOKS. Thank you, General. I have a few questions. I appreciate your statement. I read it carefully last night and I thought it was a good statement. Would you respond to assertions made by the Justice Department that their advice to ignore the law will result in a more rapid judicial resolution of these issues?

Mr. BOWSER. Yes, we just don't believe that it was necessary for the executive branch to ignore the law to provide for a court test. It just wasn't necessary.

Mr. BROOKS. What is your view of OMB Director Stockman's assertions that he—a Federal official—has the authority to violate the Constitution?

Mr. BOWSER. Well, as we pointed out in our testimony here, GAO, myself—I don't believe that the President or his subordinates have the constitutional power to unilaterally revise the Competition in Contracting Act. I don't believe that Stockman has the legal authority to issue such a directive.

Mr. BROOKS. We don't think anybody has the right——

Mr. BOWSER. Right.

Mr. BROOKS [continuing]. Any individual has the right to violate the law.

How has this controversy impacted on the Government's procurement system?

Mr. BOWSER. It's a little hard to tell, but the big thing that worries us most in this area is the uncertainty that it puts into the system. In other words, when you have the procurement people out there in the Government having to make decisions or judgments, you might say, between what the law says and directions that are coming out from OMB, why, that puts them in a very difficult situation. It also puts the industry people, I think, in a difficult situation.

So it's hard at this time really to determine how much problem uncertainty is causing, but there's no question that it's a worrisome situation.

Mr. BROOKS. Would you describe other areas where the executive branch has ignored congressional intent to comply with the Competition Act?

Mr. BOWSER. We've been looking at our regulations, and there are several areas which are inconsistent, we believe, with the directions contained in the conference report—I might ask Harry Van Cleve here to give you a few more details on our concerns.

Mr. BROOKS. I will at this time submit for the record a letter signed by Mr. Horton, Senator Cohen, Senator Levin, and me, dated December 12, 1984, pointing out some of these discrepancies. The result is, of course, that the executive is trying to rewrite legislation—that's what they're trying to do—rewrite.

The executive doesn't like the law and they want to rewrite it under some fraudulent excuse of authority. The result is sole-source procurements, thus endangering the integrity of the entire procurement process.

[See appendix A, No. 1.]

Mr. BROOKS. Mr. Van Cleve, the general counsel for the GAO, a distinguished long-time public servant. GAO finally decided to have just one general counsel. Mr. Socolar is going to be acting forever.

Mr. BOWSHER. We hope not.

Mr. BROOKS. What?

Mr. BOWSHER. We hope not. We hope that sometime later this year we can get Mr. Socolar in there officially.

Mr. BROOKS. Unless there's—

Mr. BOWSHER. Yes.

Mr. BROOKS. And Mr. Van Cleve is going to be the general counsel. Have at it.

Mr. VAN CLEVE. In our review of the agency's implementation of FAR we found, for example, two places where they had failed to pay any attention to what was in the conference report, and therefore in issuing regulations, the FAR itself did not follow what was clearly the intention of the Congress in passing the Competition in Contracting Act.

For example, follow-on contracts and unsolicited proposals are listed in the proposed FAR implementation of the Competition Act's first exception to the requirement for full and open competition.

The FAR provisions do not reflect the language in the conference report that noncompetitive follow-on contracts are to be limited to those awarded after, one, an original competitive award; and two, a cost-benefit analysis.

Further, the FAR permits justifications relating to the first six exceptions from competitive procurement to be made on a class basis. This provision runs contrary to the conference report, which states, "All determinations and decisions required for use of the exception to competitive procedures are to be made on a case-by-case basis."

"Broad categories or classes of products and services cannot be exempt from competitive procedures." We have, as you're well aware, reviewed the FAR implementation carefully, and a great number of other points have been made in the chairman's letter to the agencies.

These are simply two examples where we think that they failed to follow the conference report's advice and the clear intention of the Congress expressed in that conference report in the FAR that they issued.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

Mr. Bowsher, I want to commend you for your statement. I think it's an excellent statement to the committee.

Mr. BOWSHER. Thank you.

Mr. HORTON. From your experience and the GAO's experience over the short time since the new bid protest procedure went into effect, can you tell us what effect the OMB's directive has had on the availability of fair and equitable relief? Are agencies generally

responding to the reporting requirements within the timeframe provided?

Mr. BOWSHER. Yes, they are. We've had good luck there, and the agencies seem to be getting their procedures in better shape, and are trying to meet their deadlines, and so far at this point in time it's working quite well.

Mr. HORTON. What's been your experience with regard to suspension of contract awards in cases of preaward protests?

Mr. BOWSHER. Harry, maybe you'd better——

Mr. VAN CLEVE. The only data that we've received so far have been with respect to protests which have been decided already. We haven't got the data in our system yet about those that are still pending.

With respect to those that have been decided, we have 70 closed cases. In one of those cases we know the performance was suspended, not in any of the others. Those closed cases are probably ones that were either withdrawn or where we dismissed them on the ground that the protest lacked merit.

Mr. HORTON. Was that suspension case the only one?

Mr. VAN CLEVE. Yes, sir.

Mr. HORTON. Can you break out the status of protested procurement actions in the Defense Department since January 15?

Mr. VAN CLEVE. The data that we are getting will permit us to do so in about 6 weeks. We have not gotten what they tell me are called report formats yet.

Mr. HORTON. Well, perhaps you'll give us that report later.

Mr. VAN CLEVE. We have all of the protests rather than those relating only to the DOD. We have received as of this morning 300 protests since January 15. Of that number, 137 have been closed, most of them on a summary basis, because it was apparent on the face of the protest that it lacked merit, or that we lacked jurisdiction.

The remainder, which is 163 cases, are open and in various stages of processing.

Mr. HORTON. Well, perhaps you can update it for us, too, after you——

Mr. VAN CLEVE. We'll be glad to give you the numbers relating directly to DOD.

[The information follows:]

As of March 11, 1985, we have received 375 protests subject to the CICA protest provisions. Of that number, 261 are protests against procurements by elements of the Department of Defense. One hundred forty of the protests about DOD procurements remain open; 121 protests against DOD procurements have been closed.

Mr. BOWSHER. I think one thing we might point out, Congressman Horton, is that, you know, the system is now forcing us and the agencies to do a much better job of processing these cases and making our decisions more timely, and we have changed our procedures.

I've given more delegation to Harry and his people, and I think that the whole procedure might move in a much more predictable basis and a much more timely basis than it has in the past, and so we're very hopeful at this time, although we're still concerned about the number of cases we might ultimately get under the procedures.

Mr. HORTON. Well, I think that was one of the goals of the legislation, to make the process more effective. I think that's what is being accomplished, from what you say.

Have any specific instances of agency noncompliance with the new bid protest provisions led to filings in the Federal court system?

Mr. BROOKS. Yes, we have one—to our knowledge right now we only have one—and that's Lear-Siegler who filed a protest of a planned award of a contract to the Israeli Military Industries by the Navy. The Navy awarded the contract. Lear-Siegler filed an action in the Federal Court in Los Angeles based in part on the suspension provision of the Competition Act.

The judge has scheduled a hearing on the request for a preliminary injunction on March 11—this is our understanding right now.

Mr. HORTON. We've heard reports that agencies now are refusing to pay costs of bid preparation that GAO has awarded to successful protesters, even though those costs have been usual and accepted elements of relief in the past. Are these reports true, and if so, what's the explanation?

Mr. VAN CLEVE. We've heard the same thing, Mr. Horton, but we don't have any knowledge that that's true. We have no cases that have come to our attention where they have out-and-out refused to pay bid prep costs.

Mr. HORTON. Mr. Bowsher, on the day after the new bid protest provisions went into effect you wrote an excellent letter to the chairman and me detailing the measures you've taken in GAO to implement them, and Mr. Chairman, I would like to ask unanimous consent to have the letter included in the record.

[See appendix A, No. 2.]

Mr. HORTON. You noted among other things that your bid protest regulations were published in final form on December 20, following consideration of comments received on the proposed regulations. Could you briefly review the changes that were made in the final regulations and the concerns those changes responded to?

Mr. VAN CLEVE. May I answer that question, Mr. Horton?

Mr. HORTON. Yes.

Mr. VAN CLEVE. We received 26 comments in response to the publication. They ranged over lots of the issues, but the principal ones had to do with the desire on the part of the agencies that the protest in effect not begin, that is, the clock which measures their 25 working days within which to respond to the protest, not begin until they had received a copy of the protest, and they wanted us, for example, to say that it was not filed until they had received it.

On the other hand, the industrial community, the protesting community, had a very different and contrary wish. They wanted to file with GAO alone, and not have to worry about how fast a copy of that protest got in the hands of the procuring agency.

We modified our original rule to provide two or three things, first, that instead of filing only one copy with us, an original and a second copy be filed with us and provided that we would send that copy instantly to the headquarters of the agency involved. We then more significantly required that within 1 day after the protest was filed with GAO, a copy had to be delivered by the protester to the

procuring activity. Now, the procuring activity might be somewhere else in the country.

This poses a considerable burden on protesters to be sure that that copy is in the hands of the procuring activity. Nevertheless, until it is the activity can't really respond to it, because it doesn't know what's in it.

The other major issue which was commented on was the question of when would attorney fees be authorized to those who succeeded, and indeed some people argued that they shouldn't be authorized to anybody protesting.

We modified the provision we had initially proposed in the regulation to provide now that we would order attorney fees in cases where there had been a clear violation of statute or regulations involved in the protest; and second, where the protester did not get an award as a result of the protest. That can happen in some cases where the protest—the award may—the contract may have been fully performed before the 90 working days has elapsed.

In that case we might very well sustain the protest, find that there could be no award and therefore award attorney fees. Those were the principal issues that were commented on in the comments.

Mr. HORTON. Mr. Bowsher, I have some other questions, but we do have a large number of witnesses, and the House is ready to go into session shortly. So for the sake of time, I'd like to submit the rest to you and perhaps you could give me a written response for the record.

I do have one other question; and perhaps, Mr. Van Cleve, you might answer this: From your experience, do you know of any other instances in which the Justice Department has declared an act or a portion of an act passed by the Congress to be unconstitutional? I know that in previous instances they have rendered opinions that certain provisions would be declared unconstitutional eventually in the courts, and I don't have any real problem with that as an attorney. I think they can give their opinion as to whether or not they think something is going to be declared unconstitutional or not. But this, as I read it, is an out-and-out declaration that it is unconstitutional, and therefore, that we will not comply. In your experience, do you know of any other instance like this one?

Mr. VAN CLEVE. We know of none other whatever, Mr. Horton. We have been—we've wondered about it, given the statements that the Attorney General and the Assistant Attorney General have made on this issue.

We have searched the legal literature, we have searched the cases, and can find no case where anything like this has happened.

Mr. HORTON. Thank you.

Thank you, Mr. Chairman.

[Mr. Bowsher's submissions to Mr. Horton's additional questions follow:]

ADDITIONAL QUESTIONS OF MR. HORTON
FOR COMPTROLLER GENERAL BOWSHER .

Question

You point out that Justice's objections to the Comptroller General's authority to lift stays need not have led to a directive frustrating the stay provision in its entirety. You suggest that Congress' clear intent could have been largely accommodated, if agencies had been directed, instead, to observe a 90-day stay in any case where the national interest did not require otherwise. In that way, the issue of the Comptroller General's discretion would not stand in the way of an orderly bid protest procedure.

A. Have you had any indication that any of the federal agencies may intend unilaterally to proceed on that basis, or a similar one?

Answer

We suggested in my February 28 testimony that agencies could comply with the law in a manner consistent with the Attorney General's opinion by not proceeding with a protested procurement action for 90 days even if our Office issues an earlier decision, and by ending a stay after 90 days if a decision or satisfactory justification for delay has not been issued by our Office. We have not received an indication from any federal agency that it intends to follow our suggestion or any similar procedure.

Question

B. If agencies are suspending protested contracts, what authority are they basing this action on, now that they have been prohibited from basing their actions on the disputed CICA procedures?

Answer

Our records do not show that agencies are suspending performance under contracts where post-award protests have been filed. If the agencies were to suspend performance in such post-award situations, they would most likely base their action on the recently amended, Federal Acquisition Regulation (FAR), § 33.104 (Federal Acquisition Circular 84-6, January 11, 1985). That regulation while stating that the Competition in Contracting Act (CICA) suspension and stay provisions are unconstitutional and should not be followed, provides that the contracting officer may seek an agreement with the contractor for a no-cost performance suspension if it appears that the award may be invalidated and a delay in performance would not prejudice the government. It does appear, however, that where a preaward protest has been filed, agencies are withholding the award until we issue our decision. In these instances we assume that the agencies are withholding award pursuant to the current FAR which also provides that agencies are to withhold award in procurements where a preaward protest is filed unless the contracting officer or other designated official determines that present award is advantageous to the government.

Question

C. Is there anything you at GAO are doing or can do to help agencies work within the new bid protest process to afford relief in a way that won't cause them to run afoul of the OMB Directive?

Answer

OMB has directed agencies not to follow the statutory stay provisions, but rather has directed that they should follow the FAR. FAR requires that a contract not be awarded when a protest is filed unless there is a written determination that circumstances exist which justify making the award before the protest is resolved. See FAR § 33.104 (FAC 84-6). If the written determination under FAR is sufficient to satisfy the CICA standards for making award in such circumstances (i.e., it uses the terms set forth in 31 U.S.C. § 3553(d)(2) even though it does not refer to CICA or is otherwise made under the statute) and if the written determination is made by the head of the procuring activity (CICA does not allow this function to be delegated), we think there would be substantial compliance with both CICA and the OMB Directive.

With respect to suspension of contract performance if a protest is received after award, the FAR does permit such suspension, but only if "it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest." With some less restrictive language in the FAR, essentially permitting contract suspension in most cases, the agencies could, we think, be in substantial compliance with CICA without running afoul of the OMB Directive.

Otherwise, we do note that the agencies have been following the CICA bid protest provisions other than those concerning the stay of award or suspension of performance and the payment of costs. We are encouraging the agencies to continue their compliance and, within the limits imposed upon us by the executive branch, we are doing our best to provide an expeditious and fair bid protest forum.

Mr. BROOKS. Thank you, gentlemen. I appreciate it.

Mr. Monson, from Utah, a distinguished new member of this subcommittee.

Mr. MONSON. Thank you, Mr. Chairman.

Having read horror stories for years about the bidding procedures in the Federal Government and having seen many recommendations on it, it's good to know that some action is being taken to try and improve the procedures. In response to one of the earlier questions, you indicated that there were about 300 protests that had been filed thus far, and about 137 of those had been dismissed. Did I understand that correctly?

Mr. VAN CLEVE. Yes, sir.

Mr. MONSON. And those were dismissed without the awarding of any costs?

Mr. VAN CLEVE. Oh, yes.

Mr. MONSON. They were just completely ruled out?

Mr. VAN CLEVE. The dismissals were for a number of reasons. Some of them are on the ground that the protest appears to us to be frivolous and without any legal merit. Some are dismissed on the ground that the protester, having first protested, now has indicated that it has received whatever benefit it wishes and is withdrawing its interest in the matter.

Let me say, if I might, that the ratio of 130 cases withdrawn to 300 filed is not unusual. It's about the ratio that we find at the end of each year, that we have a great number more cases filed than go to decision.

Mr. MONSON. Of the 163 remaining, are any of those likely to be dismissed for similar grounds, or have you concluded that they do have grounds to proceed and have a recommendation issued?

Mr. VAN CLEVE. We would make a decision with respect to frivolity or a clear lack of jurisdiction early on, and so of that remaining number that were filed in January or early February, those will move to decision. That 300, however, includes cases that were filed this morning and yesterday.

And until we get a look at them we won't have a chance yet to know how many of them are to go forward.

Mr. MONSON. I understand that.

I guess the main goal of this, not having been here when it was passed, was to save money and hopefully improve the way things are being bid. But a 50-50 ratio of frivolous protests doesn't sound particularly good to me. Now, I'm new to this, and I've got a lot of learning still to do, but I wonder, are we achieving that improvement or are we asking for more frivolous cases to be filed?

Mr. VAN CLEVE. The bid protest provisions which became effective January 15 are designed and stated in the history of the law to be designed as a device to assure that competition is in fact practiced. go 790

The other provisions don't become effective as law until the 1st of April, so that we have to wait a little while to see what the full law is going to do. We are beginning to see the agency implementation of that law, but only in regulations.

As far as the effect of the bid protest aspect of that law, I would note, sir, that we have had bid protest for 60 years in the General Accounting Office. Right now the level of bid protests under CICA

is running at just about the same level of protest that we have had in prior years, slightly higher, but not noticeably.

January and February aren't very good months to make judgments on, because they're rather lean months for contracting. So that I don't think that the existence of how the statutory bid protest provision and the formality which now accompanies it, including the requirements in CICA that bid protests be decided on a much more expeditious basis than they ever had been done in the past, is in any way going to burden or cause undue expense in the bid procurement process.

I think, to the contrary, that the existence of a statutory bid protest process will assist in resolving a question more quickly and will move procurements more surely along.

Mr. MONSON. How much does this law get at what I consider to be one of the problems in the bidding process, though, and that is the specification-writing procedures, that sometimes result in products or services beyond what is reasonably necessary to perform the required function?

Mr. VAN CLEVE. Of course the law requires competition, and to obtain competition you've got to write descriptions or specifications, and to that extent there will of course be more specifications rather than simply going out and buying sole source from a particular company.

Your question, though, it seems to me goes to what we sometimes think of as gold plating or overwriting, buying things beyond the minimum needs of the agency. One of the traditional bases for protesting to the General Accounting Office has been exactly that, that the agency is seeking to buy something that is well beyond its minimum needs and the protester will then say "And my product will meet those minimum needs cheaper. You ought to buy it."

That's always been true. I imagine it will continue to be true, and I think that the bid protest process serves as one of many, but one particularly useful device to correct that tendency to gold-plate.

Mr. MONSON. Thank you.

Thank you, Mr. Chairman.

Mr. BROOKS. We want to thank you all very much. We appreciate your coming down here, General, Mr. Socolar, chief counsel.

Mr. BOWSHER. Thank you very much.

Mr. BROOKS. The next group of witnesses consists of a panel of distinguished constitutional law scholars recognized for their incisive views on the issue of the separation of powers doctrine of the Constitution.

Seated from my left, if you would, is Prof. Mark Tushnet from Georgetown University Law School here in Washington; Prof. Sanford Levinson from the University of Texas Law School; and Prof. Eugene Gressman from the University of North Carolina Law School in Chapel Hill, NC.

I understand other constitutional scholars expect to submit views on this matter in the near future, and they too can be made part of this record if we get them in time. Gentlemen, we appreciate your taking the time to share your views with us this morning.

In the interest of time, as previously arranged with you, I'd like to move directly to questioning. Your prepared statements, which I

thought were excellent, along with any supplemental material you may wish to submit, will be made a part of the printed hearing record.

[Messrs. Tushnet's, Levinson's, and Gressman's prepared statements follow:]

STATEMENT OF MARK TUSHNET,
PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

My name is Mark Tushnet. I am Professor of Law at the Georgetown University Law Center here in Washington. I have been teaching constitutional law for the past ten years and have written widely on constitutional law. In addition, I have co-authored a casebook on the jurisdiction of the federal courts. I would like to thank the Committee for inviting me to testify on this important issue. Because time for preparation was short, my remarks are somewhat abbreviated. I will submit a more detailed statement to the Committee shortly.

As you know, there are two aspects of the problem before us. First, are the relevant provisions of the Competition in Contracting Act constitutional? Second, if the President believes that they are unconstitutional, may he direct his subordinates simply to ignore them? I want to begin with some brief comments on the first issue, for I believe that its analysis clarifies the precise nature of the second.

The President contends that two provisions of the Act are unconstitutional. The first provision authorizes the Comptroller-General to lift an otherwise automatic stay on the contracting process if he or she finds a bid protest frivolous; the second allows the Comptroller-General to direct that contracting agencies pay attorneys' fees to successful bid protestors. These provisions are said to violate principles of

the separation of powers by vesting executive or judicial authority in an arm of the legislature.

This contention obviously turns on whether the Comptroller-General is an arm of Congress. I take it for granted that Congress could give an independent agency the powers challenged by the President. For present purposes we can imagine governmental agencies arrayed on a spectrum ranging from plainly legislative agencies such as this committee through independent agencies such as the Federal Trade Commission to obviously executive agencies such as the bureaus of the Treasury Department.

Where in this spectrum is the Comptroller-General located? In particular, how similar is the Comptroller-General to an independent agency? The relevant Supreme Court decisions, and consideration of matters of principle, indicate that we must take into account a number of considerations. One is the manner of appointment. Here the Comptroller-General resembles the head of an independent agency. Another consideration is whether independence of substantial legislative or executive direction is important to the sound functioning of the agency. In light of the auditing tasks of the General Accounting Office, this too points in the direction of independence.

However, other considerations suggest that the Comptroller-General should be regarded as an arm of Congress. The cases emphasize congressional intent in creating the agency, and Congress appears to have wanted the Comptroller-General to be its agent. Further, though Congress may limit the President's

power to remove heads of independent agencies, it is not obvious that it may do so as severely as it has done with the Comptroller-General.

In my judgment the arguments supporting the view that the Comptroller-General is not an arm of Congress, for purposes of separation of powers analysis, are somewhat stronger than those supporting the opposite view. But a contrary judgment is not ruled out by the relevant precedents or by fundamental principle.

With that as background, I would like to turn now to the second, and I believe more important, issue: What courses are open to a President who believes that enacted legislation is unconstitutional? Here I want to emphasize what dimensions of the problem my prior comments have excluded. We are not faced with a situation in which the President is refusing to enforce a patently unconstitutional statute, nor one in which the President's constitutional objections are patently frivolous. Different and less difficult issues would arise in such situations.

To analyze the present problem, it may help to revert to the fundamentals of the constitutional order. There is a tradition in our history defending a version of a theory that I shall call here judicial supremacy. This version of the theory of judicial supremacy begins by maintaining that the courts are the ultimate and authoritative expositors of the meaning of the Constitution. From its origins in Marbury v. Madison through its restatements in Cooper v. Aaron and United States v. Nixon, to its most recent appearance in Justice Powell's dissenting opinion last week in

the Garcia case, this version of the theory has come to include two additional propositions. First, it holds that it is improper for a legislator or the President to act on interpretations of the Constitution different from those offered by the Supreme Court. Second, it holds that, because the courts are the authoritative expositors of the Constitution, where the meaning of the Constitution is uncertain it is improper for legislators or the President to act so as to obstruct the adjudication of those controverted constitutional questions.

Thus, on this version of the theory of judicial supremacy, a member of Congress ought not vote against proposed legislation solely because he or she believes it to be unconstitutional, at least if some authority exists to support its constitutionality. Nor may a President veto legislation solely on constitutional grounds. Nor, finally, may a President refuse to enforce legislation that he or she believes to be unconstitutional. Under this version of the theory, the proper course of action is to enact, sign, and enforce the legislation and submit the constitutional questions to adjudication in the courts.

Although this version of the theory has some force in extreme cases, of which Cooper v. Aaron may be one, it has a number of flaws that, in my judgment, make it unacceptable. Before discussing them, I should note that, if one accepts this version of the theory of judicial supremacy, the President has acted improperly in the present situation. But this version of the theory seems at odds, first, with the common sense of the matter. Members of Congress and the President take the oath to

support the Constitution, and the President is required faithfully to execute the laws of the United States, which surely include the Constitution as supreme law. Those duties seem to require that they be allowed to make independent judgments on constitutional issues.

Second, the theory is inconsistent with much historic practice. Of course members of Congress may refuse to vote for proposed legislation on policy as well as on constitutional grounds; a President may veto legislation for a similar mix of reasons; and a President may direct his or her subordinates to exercise appropriate prosecutorial discretion in refusing to enforce legislation. The availability of these nonconstitutional grounds for refusing to act obscures the fundamental issue. But there are instances of refusals to act that are simply inconsistent with this version of the theory of judicial supremacy. The most celebrated is President Jackson's veto of the rechartering of the Second Bank of the United States, which he placed substantially (though not exclusively) on the ground that Congress lacked the power to create a national bank notwithstanding the Supreme Court's decision to the contrary in McCulloch v. Maryland.

Finally, and perhaps least important overall, the theory has difficulty dealing with situations in which the legislation, if enacted, is unlikely to become the subject of adjudication. Expanded notions of standing reduce the number of such situations. But recent decisions suggest that many separation of powers issues may never be adjudicated. If the problem at hand

is one of them, the theory of judicial supremacy is of no help.

The theory of judicial supremacy can be set against an alternative, which I will call a theory of competing authorities. Under the theory of competing authorities, each branch may act on its own interpretations of the Constitution. Legislators can support legislation that the courts have declared or would declare unconstitutional, or oppose legislation that the courts have declared or would declare perfectly constitutional. Similarly as to the President, who may enforce legislation in the face of judicial declarations of unconstitutionality or refuse to enforce it despite adjudications upholding the legislation. The theory of competing authorities avoids most of the flaws of the theory of judicial supremacy. It takes the constitutional oath seriously, and is consistent with much historic practice.

However, the theory of competing authorities itself has some problems. It raises the specter of anarchy, as each branch acts in a manner inconsistent with the constitutional views of the others. The theory of judicial supremacy is attractive because it offers a final resolution to controverted constitutional claims. Further, the theory of competing authorities readily degenerates into a theory of the supremacy of one or another branch. Roughly, whoever is last in line gets the authoritative say in the matter. If Congress and the President agree that a statute is constitutional, the courts may block its enforcement. If Congress believes that a statute is constitutional and the President disagrees, a veto or a simple refusal to enforce will prevent the courts from expressing their views. And if Congress

believes that a proposal is unconstitutional, it will not be presented to the President or the courts.

I believe that the theory of competing authorities remains helpful in the analysis of the problem at hand, for two sets of reasons. The first derives from the issue, mentioned above, that the last in line has the authoritative say. Whether or not this is regarded as a problem, it certainly suggests the importance of identifying who is last in line. For example, should the President be allowed to enforce a statute after the courts have declared it unconstitutional? With respect to that problem, should the courts or the President be regarded as the last in line? Surely it is desirable to have some relatively clear resolution of the question of who is last in line, so that the government may continue to function without unnecessary roughness.

In the present context, it would seem clear that the President should be regarded as last in line, in the sense that the President's signature is required before a bill becomes a law. The decision to sign or veto a bill is, for these purposes (and subject to the possibility of a veto being overridden), the last point at which the President ought to be allowed to assert a competing authority to interpret the Constitution. Otherwise the President would have two or more bites at the apple--first in deciding to sign or veto, then in deciding to comply or not comply with the statute, and then in deciding whether or not to comply with an adverse adjudication.

Giving the President two or more chances arguably enhances

the executive's power beyond an appropriate level in the precise situation before us, where the President refrained from exercising his power to veto in the first instance. A veto allows Congress to respond, and the required veto message forces the President to articulate the constitutional objections for public consideration. As I will discuss in a moment, the veto message has other attractive characteristics.

It may be said, however, that without a line item veto, a President may be effectively forced to relinquish his or her constitutional objections to a portion of a package of which the President approves on the whole. I confess that I am not terribly sympathetic to this argument. If the President's constitutional qualms are serious enough, the package should be vetoed; if they are not so serious as to lead to a veto, I doubt that the President has a strong claim to remain last in line. But in any event the President is not deprived of resources for the future by the present enactment of a statute to which he or she objects on constitutional grounds. The President remains free to seek repeal of the objectionable provision, either by a specific proposal or as part of a package that Congress will find attractive. (This counter would be unavailable if the objectionable provision somehow would produce a constant decline in the President's power. I am hard-pressed to imagine such a provision, and the ones at issue today do not remotely fit that characterization.)

The President's continuing ability to seek repeal of objectionable legislation answers another objection to treating

the veto as the last point at which the President may assert a competing authority to interpret the Constitution. This objection--again not applicable to the present issue--is that today's president may object to legislation of which yesterday's President approved. Treating the veto as the last point does not disable the later President from seeking to persuade a later Congress that the earlier enactment was unconstitutional. It simply shifts the burden of securing remedial legislation; instead of Congress trying to persuade the President that the provision is an appropriate part of our law, the President must try to persuade Congress that it is not appropriate.

The second set of reasons that the theory of competing authorities is helpful goes deeper. The prospect of competing authorities with no final arbiter can be welcomed rather than feared, if the process of competition is healthy. Perhaps the best metaphor is that of a responsible dialogue. Many provisions of the Constitution suggest that a responsible dialogue, even with a model of competing authorities, is desirable. For present purposes the most relevant provision is the requirement that when the President vetoes a bill, his or her objections be transmitted to Congress. Analogously, the President may refuse to defend the constitutionality of a statute when it is challenged in court, offering the reasons for that refusal to the court, Congress, and the public.

In contrast, refusing to comply with enacted legislation appears to thwart rather than promote a responsible dialogue. There are no regular mechanisms by which Congress may respond to

the President. To be sure, Congress may conduct hearings like this one, hold administration nominees or proposals hostage, refuse to appropriate money for the President's programs, and the like. That is, Congress can force a dialogue to occur. Surely it is better, though, to structure the process of constitutional discussion in a less awkward and confrontational way. The veto provision seems admirably suited to the task. Allowing the President to refuse to enforce legislation does not.

To summarize briefly: Even if the President and Congress have authority independent of each other, and of the courts, to interpret the Constitution, their competing authorities must be exercised through a process that promotes responsible discussion of the constitutional issues. The best process available is the ordinary process of approval by Congress followed by the President's signature or veto. Indeed, I find it difficult to think of good reasons why the President should be allowed simply to disregard duly enacted legislation.

Thank you again for providing me with the opportunity to discuss these issues with you. I am happy to answer any questions you may have.

STATEMENT BEFORE THE GOVERNMENT OPERATIONS COMMITTEE OF THE
UNITED STATES HOUSE OF REPRESENTATIVES ON FEBRUARY 28, 1984
BY SANFORD LEVINSON, PROFESSOR OF LAW,
UNIVERSITY OF TEXAS LAW SCHOOL

Mr. Chairman, my name is Sanford Levinson, and I teach constitutional law at the University of Texas Law School in Austin, Texas. I am also the co-editor, with Professor Paul Brest of the Stanford Law School, of a casebook on constitutional law, Processes of Constitutional Decisionmaking. I very much appreciate this opportunity to testify today on a topic that is one of the central concerns of our book and that I consider perhaps the most most important single riddle of American constitutional theory--the duty of non-judicial public officials to engage in independent constitutional analysis.

Today's hearing, of course, arises from the refusal of the Reagan Administration to enforce certain provisions of the Competition in Contracting Act of 1984 contained in the Deficit Reduction Act of 1984. The rationale given for the refusal to obey the Act is its putative invalidity under the constitutional command that the three great branches of government remain separate. I shall first discuss the arguments concerning these provisions and then go on to the issue of even greater importance, which is the Executive's duty in regard to statutes, passed by Congress and signed by the President, that the Executive branch nonetheless considers to be unconstitutional.

I. The Constitutionality of the Deficit Reduction Act of 1984

I will not rehearse the specific provisions of the Act, since they are well known to this committee. Suffice it so say that the Department of Justice has consistently argued that the the Constitution prohibits participation by the Comptroller General in the process of deciding on the validity of protests regarding the award of federal contracts. In particular, the Department emphasizes the role of the Comptroller General as a "legislative" official, indeed "an arm of the legislature," *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971), quoted in *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 ft. 1 (D.C. Cir. 1984). Although the Comptroller General is appointed by the President, with the advice and consent of the Senate, and is therefore clearly an "Officer of the United States," *Buckley v. Valeo*, 424 U.S. 1, 128 ft. 165 (1976), he is removable by joint resolution of the Congress, among other procedures. According to the Department, therefore, this basic accountability to the Congress disables the Comptroller General from engaging in essentially executive duties. Principal reliance is placed on the most recent cases of the United States Supreme Court that have considered the basic theory of separation of powers, *Buckley v. Valeo*, supra, and *INS v. Chadha*, 103 S.Ct. 2764 (1983).

Constitutional law is something of a minefield, especially these days, and only the foolhardy would speak overconfidently about what the Constitution does and does not tolerate. Of no area is this more true than separation of powers, a term which does not appear as such in the Constitution but which

nevertheless has informed our basic sense of governmental structures since 1787. That caveat being stated, I must nevertheless also state that I have little problem in viewing the specific provisions as perfectly acceptable under the Constitution.

Buckley v. Valeo is, I think, irrelevant to the present controversy, since that case dealt clearly with the ability of the Congress to appoint officials directly to the Federal Election Commission. The Court unanimously held that such a procedure violated the Appointments Clause of the Constitution, which requires that appointments of officers of the United States be made by the President, heads of departments, or courts of law. Here, on the contrary, the appointment of the Comptroller General meets the specific terms of the Clause. The fact that the Congress can, in theory, remove the Comptroller General by joint resolution is, I believe, not sufficient to change the analysis. One must begin realistically by noting that no Comptroller General has been so removed, and it boggles the mind to suggest that such a momentous step might be taken because of Congressional displeasure with a decision of the Comptroller General in regard to the awarding of a federal contract. It may be true that the Comptroller General is, in some sense, ultimately more "accountable" to the Congress than to the President, but this does not, I believe, so distort the relationship between the two branches that the Constitution must intervene to stifle the procedures called for by the Act.

The essential problem raised by almost all of the modern separation of powers cases, of course, is what has come to be called the modern administrative case. Indeed, for almost a half-century now, we have become used to references to a "fourth branch of government," the bureaucracy and administrative agencies, that have radically transformed an earlier understanding of a more simple tripartite structure of government.

It is obvious to any observer that these agencies are quasi-legislative insofar as they make specific regulations often based on extremely general commands of Congress to act in the "public interest"; they are executive insofar as they enforce their regulations; and they are quasi-judicial as well insofar as they have increasingly elaborate systems of administrative courts to adjudicate controversies generated by the administrative scheme. I have significant difficulty differentiating the Comptroller General from any of the other administrative agencies, at least at the constitutional level.

The Attorney General relies importantly on the Chadha case, which invalidated the so-called "legislative veto" by which one House of Congress could affect the legal rights of government officials or private persons outside of the Legislative branch by invalidating a decision of an executive or administrative official. The Supreme Court, by a 7-2 vote, considered this to be "lawmaking," and it went on to say that "[i]t is beyond doubt that lawmaking was a power to be shared by both Houses

and the President," 103 S.Ct., at 2782, and not to be delegated to a single House of the Congress.

I confess that I have immense difficulties viewing the actual decisions envisioned by the Comptroller General as "lawmaking," unless one says that every review of a federal contract results in equal "lawmaking." That is, I presume that no serious constitutional argument could be directed at a congressional decision to establish a new administrative agency that would review all federal contracts and do precisely what the Comptroller General is asked to do under the Deficit Reduction Act. The one and only concern is whether or not the Comptroller General, different in certain ways from the typical administrative agency, can engage in such otherwise uncontroversial activity.

Presumably this is the point raised by the Department of Justice in its citation of the 1928 case *Soringer v. The Philippine Islands*, 277 U.S. 189, and its definition of "legislative power" as "the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement." (The latter part of the clause, dealing with appointment, is inapplicable because it is, of course, the President who appoints the Comptroller General.) The Department rightly argues that the Comptroller General is charged with certain enforcement tasks under the Contracting in Competition Act. But I do not believe that the Comptroller General, however much in some ways part of the legislative branch, is so implicated with the legislature as to call into being the invalidity of an act of Congress.

I believe that this concern expressed about legislative enforcement of its own laws requires a deeper elaboration of the Chadha case beyond rather simplistic notions of separated powers. Why, that is, ought one be concerned about the legislative veto? Why ought one not be concerned about the role played by the Comptroller General?

Chadha dealt with the direct intervention by Congress into decisionmaking by the executive branch. Chief Justice Burger, writing for the majority, emphasized that the historic roots of separating the legislature from the enforcement of the law lay in a concern about the potential for political corruption. A fear that "special interests could be favored at the expense of public needs" requires that enforcement be protected from the "strong passions and excitements" that sometimes characterize the legislature, at 2783. Less ominously, one might simply say that the process of law enforcement and administrative rulemaking should, as much as possible, be distanced from the concerns of persons concerned about their imminent campaigns for re-election. Law enforcement, which should transcend partisan political considerations, should indeed be removed from the legislature. I think it is hard not to be sympathetic with such concerns and to wish to read them into the Constitution as a protection against tyranny. This scarcely requires, however, that one accept the Justice Department's view in the instant case.

I should admit, incidentally, that I am unpersuaded by the sweep of Chief Justice Burger's opinion; instead, I believe

that Justice White stated a much more generally defensible view, even though, in the specifics of Chadha, I have considerable sympathy for Justice Powell's focused and precise invalidation of the specific legislative act under consideration. Still, I don't think that one must reject the majority opinion in order to find the Competition in Contracting Act of 1984 constitutional.

The Department of Justice takes special note of the fact that a panel of the Court of Appeals for the District of Columbia recently cited Chadha for the proposition that "there might be a constitutional impediment" to giving binding effect to determinations of the General Accounting Office. Delta Data Systems, supra, at 201 ft. 1. The Court, however, did not cite any specific aspect of Chadha, and, with all due respect, I think that the present circumstances are easily distinguishable.

The direct intervention by Congress that was so patent in Chadha--and is the central concern of those who emphasize the separation of legislative from executive power--is totally absent under the procedures set out by the Act. The Comptroller General of the United States and the General Accounting Office are scarcely handmaidens of specific legislators. An appointee of the President, the Comptroller General has in fact much more independence than the typical member of a federal agency, whose term of office expires far short of 15 years and who may constantly be worried about being reappointed by a President. Indeed, I am not aware that any federal officials beyond judges, with their lifetime

appointments, have such secure tenure as the Comptroller General. I believe that this single fact exemplifies the weakness of the position taken by the Department of Justice and would lead a court to a far different conclusion than that reached in Chadha.

Indeed, the real problem with extending Chadha's holding in the way required by the Department's analysis is that it would call into account the constitutional validity of the entire administrative State as we know it. This, of course, was the central concern expressed by Justice White in his lengthy dissent. A simplistic view of the government as consisting of three branches just does not come to terms with the fourth branch and its mixture of functions. Because of the sweep of some of Chief Justice's language, one cannot dismiss the Department's view as "frivolous," but I find it almost impossible to believe that a majority of the United States Supreme Court would embrace a view that would require judicial intervention and "imperialism" of dazzling proportions.

II. The Duty of the President to Enforce a Statute Passed by the Congress (and Signed by the President)

Does the President of the United States have the duty to engage in independent constitutional analysis while conducting his office? Stated this way, the answer is clearly yes. The President takes an oath of office pledging that he will "preserve, protect and defend the Constitution of the United States." Just as John Marshall derived from his oath of office

the principle that a court need not enforce a congressional statute deemed to violate the Constitution, so can the President easily argue that he too is prevented from enforcing an unconstitutional statute. Indeed, it would be paradoxical to argue that the President does have the duty to enforce an unconstitutional statute. The question, however, is not that simple. Instead, I think that we must ask first what procedures the President is required to go through when making such a determination and secondly if there are specific categories of laws where we might be more or less willing to trust Presidents to engage in such analysis.

As this very controversy illustrates so well, the President is not the first person to consider the constitutionality of the Competition in Contracting Act. This Congress has also considered the question, and therefore the correct way of beginning our analysis is to ask how the President must structure his response to the Congress.

The Constitution itself provides one clear answer: The President can veto legislation he believes to be unconstitutional. Even here, I might point out, there is some question as to the freedom a President ought to give himself to challenge a congressional judgment. The first elaboration of the issue came up during the consideration in 1791 by George Washington of the bill establishing the First Bank of the United States. Thomas Jefferson, the Secretary of State, wrote an opinion attacking its constitutionality. That opinion

included a remarkably interesting paragraph, however, that provides room for thought even today:

It must be added, however, that unless the President's mind on a view of everything which is urged for and against this bill, is tolerably clear that it is unauthorized by the Constitution; if the pro and the con hand so even as to balance his judgment, a just respect for the wisdom of the legislature would naturally decide the balance in favor of their opinion. It is chiefly for the cases where they are clearly misled by error, ambition, or interest, that the Constitution has placed a check in the negative of the President. (Quoted in Brest and Levinson, pp. 14-15.)

As I read this, it suggests that the President should defer to congressional judgment unless he is clearly convinced that the Congress made a mistake. On the one hand, after all, we have the judgment of a majority of what are now a total of 535 legislators, who also take oaths to support, protect, and defend the Constitution; on the other is a single individual who, whatever his personal good faith, is trying to set aside the congressional judgment.

If Jefferson was willing to argue that a President should be cautious even in vetoing a bill on constitutional grounds, in spite of the clear allocation of such a power by the Constitution, how much more would he wish the President to be absolutely certain of his position before disdaining to enforce a statute that was not vetoed. A rough analogy can be drawn to some standard approaches toward the problem of judicial review.

Going back to John Marshall, the strongest arguments for the judicial invalidation of congressional statutes occur in

contexts where the meaning of the Constitution appears absolutely clear. In *Marbury v. Madison* itself, Marshall, falsely in my opinion, argued that Article III could be interpreted only one way. Where genuine debate over the meaning of the Constitution is possible, however, he seems to suggest that the courts should accept the congressional resolution.

Modern constitutional theorists, who are generally inclined to find more ambiguity throughout the Constitution than did Marshall, are likely to argue that judicial invalidation should occur only when there is reason to believe that Congress has acted in an especially unfair way. Emphasis is placed by such theorists, as well as many of the decided cases of the Supreme Court, on such acts as closing the political process itself to those with dissenting views or passing legislation that discriminates against historically disfavored minorities. Otherwise, the principles both of majority rule and respect for the almost inevitable ambiguities revealed by close textual analysis dictate deference to the congressional judgment.

The principles that counsel a certain caution by courts before striking down legislative enactments might well work as well to provide at least some kind of barrier to precipitate presidential action, especially in the absence of the use of the veto power granted the President under the Constitution. Indeed, what President Reagan is trying to do here is establish a de-facto post-hoc line item veto, albeit one that is constitutionally based.

I confess that I have considerable sympathy for the position that the President might be authorized under the Constitution to veto specific sections of a statute on the grounds that they are unconstitutional, as opposed merely to his finding them unwise policy. But, of course, President Reagan did not exercise his constitutional authority to veto legislation and thus give Congress a chance to override. Instead, he is seeking to establish a far more extensive power, one which one give him the ability to sign legislation and then, without giving the Congress an opportunity to override his views, simply refuse to enforce the legislation that he himself had signed.

From my perspective, it would have been far better had the President asserted a line item veto authority, constitutionally based, than to assert a far more wide-reaching authority that denigrates Congress' essential role in the constitutional structure. To be sure, an assertion of the type I am suggesting would be unprecedented, but it would be scarcely less so than the one actually being made. It would also be far more in keeping with the spirit of our institutions that the unilateral decisionmaking revealed here.

It is only fair to point out, though, that even the adoption of a veto practice described above would not speak to the problem of a President who genuinely believes that a measure signed by a predecessor was unconstitutional. It is hard to argue that one President ought to be able to bind another on matters of constitutional analysis any more than one

group of Supreme Court justices can genuinely bind a successor group.

Still, it is necessary to recognize that we do not have as an operative constitutional practice the line item veto of the type I am describing. Returning to the reality of modern politics, we must take into account the full complexities of modern legislation and the factors that make the present veto practice inadequate as a full protection against putatively unconstitutional legislation.

A reality of modern legislative practice is that, as with the Deficit Reduction Act, legislation is often "omnibus," containing many different acts presented on an all-or-nothing basis to a President. As with the most famous example, where Congress during World War II attached to a defense appropriations bill a rider having the effect of firing three federal employees suspected of being subversives, a President might have to sign a bill because non-signature would generate a disaster. What is a President supposed to do then? Is his only course to enforce a statute that is viewed as unconstitutional?

One good answer, of course, is yes, especially if enforcement of the statute in no serious sense involves issues of personal liberty or other important individual rights. I shall return to this point below, but let me assume for the moment that the President should be vigorous in defending his view of the Constitution in all of its areas, including separation of powers. Still, the procedure by which such review takes place is vital.

If there is one thing we can be sure of, it is that Ronald Reagan has not personally studied the relevant legal materials in order to make an independent determination of the meaning of his oath. We are obviously talking, that is, of the institutionalized Presidency rather than decisionmaking by a specific President. What kind of institutionalization should we require in order to tolerate, even in theory, presidential repudiation of statutory commands?

Let me begin my answer with a negative: We should not tolerate a process whereby a politically appointed assistant attorney general writes a memorandum that is designed to accord with an already adopted position of the President. If the executive branch is to take on some of the attributes of a court, a development which I would applaud in many ways, it should seek out the most disinterested member of the Department of Justice and demand of that official precisely the same behavior that is required of a judge. To be specific, I would suggest that presidential interposition should even be thinkable if and only if the Solicitor General of the United States delivers a published opinion stating that in his or her opinion the congressional act under question violates the Constitution of the United States. I want to emphasize that this is a different test from one simply requiring that the Solicitor General find that a "good faith" argument supports the President's position or that he or she would be willing to defend the President's position in court.

The point, of course, is that the presidential activity is designed to preclude judicial review, or at least to make judicial review dependent on the fortuity of a claimant under the Act having standing to be able to trigger judicial review. If the Executive adopts such a posture, then we must require as a minimum an internal procedure within that branch that pays due heed to the values embraced within the Oath of Office.

At present the Solicitor General does not prepare official opinions; that is the formal job for the Attorney General, though they are actually prepared by the Office of Legal Counsel within the Justice Department. This, however, is a development within the past thirty years. Before 1951, the Solicitor General indeed was responsible for preparing opinions, and I strongly encourage this Committee to consider reviving this role.

It does no discredit to the incumbent Attorney General to note that the Solicitor General is almost always an unusually distinguished lawyer, often with previous judicial or academic experience. The Solicitor General is, of course, a presidential appointee and is therefore accountable to the President, but the office has an established tradition of at least quasi-independence. One might well view the deliberations of the Solicitor General as relatively disinterested in a way that would be absent in regard to the rest of the Department of Justice.

By no means would a "ruling" of the Solicitor General be dispositive. Judicial review might well be possible, assuming

proper standing, and the Solicitor General would have the opportunity of presenting the argument to a court, but in the interim we would at least be assured the highest level of constitutional analysis that could be expected. One can have little confidence that such a level has been manifested in this instance.

I want to conclude by returning to the second point mentioned earlier: Are we more willing to trust the President in certain areas of the law instead of others? My tentative answer is yes. That is, a President who refused to enforce certain statutes on the grounds that they are significant deprivations of individual liberties or fundamental public values would be entitled to a measure of respect, especially if the decisionmaking process prior to non-enforcement were the one described above. I can easily imagine admiring a President who refuses to indict individuals under a statute thought to be unconstitutional, since an indictment can often be disastrous to the individual involved. But here no issue of personal liberty is present.

The issue that is presented--separation of powers--is one where we might be least willing to trust independent presidential decisionmaking, since there is no reason at all to view the President as a genuinely disinterested party. He is engaged in turf protection, not in the protection of fundamental liberties. Of course, one might view Congress also as an interested party and be disinclined to accept their view as the last word. If one believes that the Constitution

genuinely speaks to the issue of separation of powers, then it is perhaps especially appropriate that the judiciary play an umpiring role between the two branches, since it is the one branch that can be viewed as disinterested in this battle over turf.

In conclusion, let me congratulate this committee for bringing to public attention an issue of the highest public importance. The issue of federal contracting procedure is not one designed to provoke public passion. But the underlying issue--which was described in the 1960's as the "imperial Presidency"--is back with us in spades, and one has only to look throughout the Reagan Presidency, whether in Central America or the attempts to fabricate an official secrets act out of whole cloth, to know that this is an Administration that does not fundamentally respect the constraints of office. I hope that the deliberations of this committee help to roll back the amount of turf being claimed by this Administration.

Before the
HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

February 28, 1985

STATEMENT OF EUGENE GRESSMAN*

on

Executive Refusal to Execute Certain Provisions
of the Competition in Contracting Act of 1984

On December 17, 1984, the Director of the OMB, acting on the advice of the Attorney General of the United States, issued a directive to all heads of Executive Departments and Agencies to disregard certain bid protest provisions of the Competition in Contracting Act of 1984. That directive was premised on the Attorney General's conclusion that two provisions of that Act "are unconstitutional because they purport to authorize the Comptroller General to exercise Executive authority in violation of the principle of Separation of Powers."

In my judgment, this directive constitutes a willful disobedience of the will of Congress, as expressed in the two bid protest provisions of this Act. In our constitutional system of government, such a refusal by the Executive to "take care that the Laws be faithfully executed" cannot and must not be tolerated. The bases for my judgment in this respect may be summarized as follows:

(1) Whatever the merits of the Executive's constitutional doubts about the statutory provisions in question, the central fact is that the Constitution nowhere excuses the President from fulfilling his vested obligation (Art. II, Sec. 3) to "take care that the Laws be faithfully executed" because of any sincere doubts he may have as to the validity

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of the laws that are his to execute. "It is a startling notion," Raoul Berger has written, that a President "may refuse to execute a law on the ground that it is unconstitutional. To wring from a duty faithfully to execute the laws a power to defy them would appear to be a feat of splendid illogic." R. Berger, Executive Privilege: A Constitutional Myth 306 (1974).

(2) Put differently, once a bill has passed through all the constitutional forms of enactment and become a law, perhaps even over a presidential veto grounded on constitutional objections, the President has no option under Article II but to enforce the measure faithfully. The Constitution simply does not give the President "the power to defeat the will of the people or of the legislature as embodied in law." 3 W. Willoughby, The Constitutional Law of the United States 1503 (2d ed. 1929). Or, as Professor Corwin has written, "once a statute has been duly enacted, whether over his protest or with his approval, he [the President] must promote its enforcement." E. Corwin, The President: Office and Powers 79 (3d ed. 1948).

(3) The President's Article II duty of executing laws, as Justice Holmes once wrote, "is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting). In other words, if the execution of a law is to be faithful, it must be faithful to precisely what Congress has written into the law, no more and no less. But once the Executive oversteps the bounds of faithfulness, either by adding to or subtracting from what Congress has provided, then the separation of powers equilibrium established by our constitutional system tilts dangerously toward the Executive Branch.

(4) The Supreme Court's ruling in Youngstown Co. v. Sawyer, 343 U.S. 579 (1952), teaches that when the President tries to do more than what a statute permits him to do, the President becomes a lawmaker, a status foreign to the constitutional division of power. Certainly, as the Court there said, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." 343 U.S. at 587. Rather, the Constitution places the lawmaking function exclusively in the hands of Congress, i.e., the function to "make laws which the President is to execute." Id. Thus the power of execution does not include the power of affirmatively adding to what the legislative body has provided.

(5) By the same token, the Executive's power of execution does not include a power to ignore or disobey what Congress has provided. To permit the President to disobey or to refuse to execute a portion of a statute is to engage in negative Executive lawmaking, as happened in the impoundment crisis of a decade ago. Such refusal to execute, be it due to constitutional doubts about the statute or otherwise, amounts to a partial repeal of the statute -- a repeal that can constitutionally be effected only through the normal legislative processes. The principles enunciated in Youngstown Co. v. Sawyer would seem to bar such negative lawmaking by the Executive. That proposition would seem to be at the heart of Justice Rehnquist's statement, written in 1969 as an Assistant Attorney General commenting on the President's impoundment authority:

It is in our view extremely difficult to formulate constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.

(6) The ultimate irony here is that the Executive's protest that Congress has sought to authorize the Comptroller General to exercise Executive authority is raised by means of an Executive invasion of the legislative powers of Congress -- by effecting a "non-execution" repeal of the challenged provisions of the Competition in Contracting Act. The Executive is attempting to read Article II "as giving the President not only the power to execute the laws but to make [and unmake] some." Youngstown Co. v. Sawyer, 343 U.S. at 633 (Douglas, J., concurring). And the Executive is seeking to use Article II not only as a vehicle for executing legislative powers but as a mechanism for testing the constitutionality of the statutory provisions. There are certainly better methods of securing judicial review of those provisions than by an Executive violation of the separation of powers doctrine and by an Executive refusal to "take care that the [Competition in Contracting Act] be faithfully executed."

(7) Finally, the foregoing sentiments do not imply that the President is without power to make his own assessment of the constitutionality of statutes, either before or after final enactment. And we have witnessed situations, such as the "one-House veto" litigation, where the Executive has simply refused to defend the constitutionality of a statute when judicial review has been properly instituted. But that is a far cry from saying that the Executive may express his constitutional displeasure with a duly enacted statute by ignoring or refusing to execute it in the first instance. Such inaction by the Executive strikes at the very fabric of the separation of powers doctrine. Congress should take prompt action to repair the jagged tear in that fabric created by the OMB's directive of December 17, 1984.

Mr. BROOKS. I have a few questions that I will ask you. You may all comment on them, or one, or two, or however you all want to handle that.

Gentlemen, would you summarize your views regarding the constitutionality of both the Competition Act and the executive action in ordering the agencies not to comply with the act?

Who would want to——

**STATEMENT OF MARK TUSHNET, PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER**

Mr. TUSHNET. I will start, I suppose.

Mr. BROOKS. Professor Tushnet, is that correct? Tushnet or Tushnet?

Mr. TUSHNET. That is fine. Let me give the sort of bottom line on both questions first.

Mr. HORTON. Pull the microphone up to you, please. Thank you.

Mr. TUSHNET. My judgment is that the provisions of the Competition in Contracting Act are, on balance, constitutional. I think there are arguments that can be made against their constitutionality. But taking everything into account, it seems to me that the provisions do satisfy the requirements that these kinds of decisions be made by nonlegislative actors.

As to the second question, the constitutionality of the Attorney General's and the President's refusal to comply with the legislation, my position is that under these circumstances it is not proper for the President to refuse to comply with the legislation. As we get into later questions, I can elaborate on my reasons for the latter judgment.

Mr. HORTON. I am sorry, I didn't hear you because we were getting some information on action on the floor. Would you answer that second question again for me, please?

Mr. TUSHNET. Certainly. It is my judgment that the President's refusal to comply with an act of legislation is, under the circumstances here, improper. The primary reason is that the legislation is not plainly unconstitutional, and under those circumstances, the President ought to, I believe, act in a way more likely to promote a regularized systematic examination of the constitutional issues.

Mr. BROOKS. Professor Levinson or Professor Gressman, would you like to add to that?

**STATEMENT OF SANFORD LEVINSON, PROFESSOR OF LAW,
UNIVERSITY OF TEXAS LAW SCHOOL**

Mr. LEVINSON. Yes. I basically agree with Professor Tushnet. I think—I personally believe that the legislation is constitutional. I think it is impossible to take seriously the view expressed by the Attorney General in a letter of February 22 to Chairman Rodino that the act is plainly unconstitutional. And I certainly agree with Professor Tushnet that where an act is not plainly unconstitutional or where the enforcement of a constitutionally doubtful statute would significantly infringe individual liberties or some fundamental values, which this legislation does not, it is also manifestly improper for the executive branch not to enforce it.

not to enforce it.

Mr. BROOKS. Thank you.

Professor Gressman.

STATEMENT OF EUGENE GRESSMAN, PROFESSOR OF LAW,
UNIVERSITY OF NORTH CAROLINA LAW SCHOOL

Mr. GRESSMAN. Yes. I would not only agree with the two professors by my side here, but I would also state those conclusions more emphatically. I am firmly convinced that this particular statute is truly and totally constitutional. It represents an execution of the congressional power of inquiry and oversight over the executive branch and the various agencies therein.

Now, it seems to me that this is a very vital and strong base from which this statute proceeds. The Attorney General has given no recognition to the fact that Congress is, in this instance, utilizing the Comptroller General and the GAO to exercise part of the power that is necessarily resident in Congress to inquire into the operations of the executive branch, and to provide necessary oversight of those matters.

And if there is any authority needed for that, it is to be found in the 1927 decision of the Supreme Court in *McGrain v. Daugherty* 273 U.S. 135, which fully explores the great congressional power of inquiry. Congress can exercise that power either through its committees or through the agency we know today as the GAO.

Now, as to the second proposition, I am equally firm in the conclusion that the President and the executive branch have no constitutional excuse for refusing to implement and execute this particular statute. It is the duty and the obligation on the President, as I read article II, section 3, faithfully to execute all the laws of the United States. Certainly, a belief by the President or the Attorney General, sincere though it may be, that a particular statute which has been duly enacted is, in part, unconstitutional does not in and of itself constitute a constitutional reason or excuse for refusing to execute it.

In other words, one cannot draw from the article II obligation to faithfully execute the laws a power or a right not to execute for whatever reason. And to the extent that the President refuses to execute a particular section of a statute duly enacted, that constitutes, for all practical purposes, a repeal of that section of the statute. To that extent, it is the President who is violating the separation of powers doctrine by engaging in a legislative act of repealing, ignoring or authorizing nonexecution of a statute or a provision thereof.

It is the ultimate irony in this situation that the President and the Attorney General are accusing the Congress of invading the executive function of executing a statute at the very same time that the President is invading the legislative realm by ignoring and refusing to execute that same statute. Such a refusal, I report, logically and realistically is a legislative function itself. So what we have here are the two branches of the Government, in effect, accusing each other of violating the separation of powers doctrine.

But my bottom line, of course, is that the blame for this situation has to rest with the executive branch. The constitutional provision in article II has no exception to it; that is, the President must execute all laws that are duly enacted, not just those the President desires to execute. If he has any reason to believe that the law which he is executing may be unconstitutional, there are other ways to test that in the courts. It is the judiciary, not the executive, that makes final determinations as to the unconstitutionality.

Mr. BROOKS. If the President had faithfully fulfilled his obligation to see this law executed and enforced, despite his constitutional objection, would that have impeded in any way the resolution of the constitutional issue by the courts, Professor?

Mr. GRESSMAN. No. There are a number of ways in which that can be raised in the courts, and I do not think that failing to execute a statute is going to speed up that process or hinder it either way. It depends upon the availability of a party who has standing to raise the constitutional question in a given proceeding in a Federal court.

Mr. BROOKS. You do not disagree with that either?

Mr. TUSHNET. No.

Mr. LEVINSON. I—

Mr. BROOKS. Pardon me. Professor Levinson.

Mr. LEVINSON. I slightly disagree, because I think that the important issue is the one mentioned by Professor Gressman at the very end, whether there is a party who would have standing.

It may be the case in this specific legislation that it is easier to get into court without enforcement. I do not think that is sufficient to justify what the administration has done. But I think there could be problems in finding a plaintiff with standing to challenge it had the administration enforced it.

Mr. BROOKS. Aside from the constitutional implications, are there other problems with the executive branch refusing to enforce laws based on their own constitutional interpretation?

Mr. TUSHNET. Well—

Mr. BROOKS. Professor Tushnet.

Mr. TUSHNET. Well, I think the primary difficulty is that the executive branch is not set up to do a tremendously effective job of assessing constitutionality. The primary legal advisors to the President are in the main political agents of the President, as well as legal advisors, in contrast, for example, to judges whose sole job is to determine legal questions.

That is not to say that the advice rendered by the Attorney General or the Office of Legal Counsel is frivolous as a matter of law or inevitably infected by political consideration, but it is to suggest that one should be skeptical about the ability on a broad scale of the Attorney General's Office of the Department of Justice to make appropriate determinations on constitutional questions.

Mr. BROOKS. I have one further question I would like you to consider. Given the executive action in this instance, what can Congress do to see that its will is fully carried out? Have you any thoughts on that? Mr. Levinson?

Mr. LEVINSON. Well, I would think to actively intervene in any of the litigation since obviously the Department of Justice will not defend this law, usually—obviously in a suit involving a Federal

statute, the Department of Justice defends the constitutionality. In this case, they are clearly not going to. I think it is very important that Congress intervene as soon as possible.

The other sources of remedies are probably in this political context unrealistic because they range from cutting off budget appropriations to impeachment, and I think that is clearly not in the cards here.

I suspect that Congress is confined to try to encourage a judicial test as quickly as possible of the administration's action.

Mr. BROOKS. Professor, we have, I think, from the House and Senate both filed amicus curiae briefs in the California case on this issue, as one or all of you pointed out to us earlier. So, I agree with you. That is the best effort that we can do. I want to put in the record at this point a letter—or I would rather wait until the conclusion of our questions for you all when we also submit some written questions. At that time, I will put in a letter to the Honorable William French Smith, Attorney General, from Peter Rodino, chairman of the Judiciary Committee, and his answer of February 22 to which you personally refer. We will put that in the record today even though we are going to have them next week.

[See appendix A, No. 3.]

Mr. BROOKS. The first order of business in the Judiciary Committee, on which I have served for many years, will be the authorization of the Justice Department appropriations. I look forward to that interrogation.

Mr. HORTON. Mr. Chairman, I know we have to go to get this vote. I have some questions, but if I could submit them to each of you in writing and then have you submit your answers, I think we could save some time.

Mr. BROOKS. Without objection, that will be done.

Mr. HORTON. And we have got other witnesses.

Mr. BROOKS. And I have some to submit.

Mr. Monson, you have any? You may want to.

Mr. MONSON. I may have.

Mr. BROOKS. We will do that.

[Messrs. Tushnet's, Levinson's, and Gressman's submissions to Mr. Brook's additional questions and Mr. Horton's questions follow:]

ADDITIONAL QUESTIONS OF CHAIRMAN BROOKS
FOR PROFESSOR MARK TUSHNET

1. Does the President have a role under the Constitution in assessing the constitutionality of laws?
2. What means does the Constitution provide the President to assert his constitutional views regarding laws?

These two questions have related answers. Plainly the Constitution gives the President some role in assessing the constitutionality of laws. As did Andrew Jackson, a President may veto legislation approved by Congress, solely on the ground that in the President's view the legislation is unconstitutional. Similarly, the President may direct subordinates to testify against proposed legislation, solely because in the President's judgment the legislation would be unconstitutional. Finally, even after a statute is enacted the President may direct subordinates to refrain from defending, or even to challenge, the constitutionality of the statute when its constitutionality is drawn into question in a judicial proceeding. These are only a few of the means the President may use to assert his views on the constitutionality of laws; others can readily be imagined. The question for this Committee, and for Congress, is whether, in light of the range of methods already in the President's hands, it is necessary, useful, or permissible to allow the President to assert his constitutional views by the additional method of directing subordinates simply not to comply with the commands of the legislation. As I indicated in my testimony, I believe that this additional method is neither necessary nor proper for the sound functioning of the constitutional order.

3. Is the Executive's action--directing the agencies to ignore the law in this instance--consistent with the executive provisions in the Constitution regarding lawmaking?
4. What does the Constitution indicate about the President's duty to enforce the laws?

Again the answers to these questions are related. The Constitution requires that the President take care that the laws be faithfully executed. The most acceptable reading of the "take care" clause requires that the President faithfully execute all the laws of the United States, including the Constitution as one such law. (Alternatively, the "laws" that must be faithfully executed are all but only those laws that are consistent with the Constitution.) This reading is reinforced by the oath that the President takes to support the Constitution. Thus the Constitution requires the President to assess the constitutionality of laws before deciding to enforce them.

However, just as courts, in determining whether a statute is constitutional, must give some weight to the determination of the other branches that the statute is constitutional, so too must the President give weight to the judgment of Congress that the statute is constitutional. (For one qualification, see the answer to question 6 from Congressman Horton, below.) An additional consideration at the enforcement stage is whether

enforcing the statute will adversely affect individual rights pending a final determination by the courts. In my judgment, these considerations lead to the conclusion that the President acts properly in refusing to enforce legislation because he believes it to be unconstitutional in only two situations: (a) where the legislation is patently inconsistent with fundamental dimensions of the constitutional scheme, or (b) where the President can make a reasonably firm judgment that the legislation violates constitutional provisions conferring rights on individuals.

5. This question asks me to assess the legal arguments made by the Administration in a number of attachments.

The legal arguments made in these documents are extremely weak. One set of arguments deals with the constitutionality of the disputed provisions of the Competition in Contracting Act. As I indicated in my testimony, I believe that those provisions are probably constitutional, although the Administration's arguments on that issue are not frivolous. However, it is frivolous to characterize the Competition in Contracting Act as plainly unconstitutional. Yet this is exactly what the authorities relied on by the Administration require if it is to justify its refusal to enforce the Act.

The Administration relies on a group of disparate precedents to justify its refusal to enforce the Act. The Appendix to Attorney-General Smith's letter to Chairman Peter Rodino lists ten prior instances of "executive refusals to defend or execute statutes." Eight of these involve litigation positions taken by the executive branch, and are thus plainly distinguishable. One involves a policy of nonenforcement of certain criminal statutes. This policy satisfies at least the second, "individual rights" requirement for nonenforcement suggested above, and, in light of Bolger v. Youngs Drug Products Corp., 103 S.Ct. 2875 (1983), may satisfy the first, "patently unconstitutional" requirement as well. The last involves President Johnson's refusal to comply with the provisions of the Tenure of Office Act as applied to a member of his Cabinet. This may satisfy the "patently unconstitutional" requirement. But more generally it seems to me unsound as a matter of constitutional practice to rely for justification on an action that provoked one of the major constitutional crises in our history.

I find it useful to point out that one of the sources on which the Administration relies states only that if Congress passed a statute that was "upon its very face in flat contradiction of plain expressed provisions of the Constitution," would refusal to enforce be justified. Whatever one thinks of the constitutionality of the Competition in Contracting Act, it cannot seriously be contended that it is unconstitutional in that dramatic a way.

QUESTIONS OF MR. HORTON FOR PROFESSOR MARK TUSHNET

1. QUESTION: Would you explain the procedure by which a judicial determination might be obtained on the constitutionality of both provisions of the Act which the Executive has stated it will refuse to defend, the stay provision and the authority to award costs and fees?

A. Is the likelihood of obtaining a prompt judicial determination of the constitutionality of the Act enhanced, lessened, or unaffected by the Executive's decision to refuse to implement these provisions? (The Attorney General's letter of November 21, 1984, states that "...the Department's decision...will best assure a rapid and definitive judicial resolution of these constitutional issues.")

ANSWER: The Attorney General stated that the policy of nonenforcement would "assure a rapid and definitive judicial resolution" of the constitutional issues. This is certainly overstated. No matter what posture the Administration takes, a prompt judicial resolution is likely. Had the Administration complied with the requirements of the Competition in Contracting Act, at some point a disappointed bidder would lodge a protest with the Comptroller General, who would impose--and then not lift--a stay of the award. At that point the successful bidder would be in a position to seek a judicial determination that the contract should be awarded because the stay provisions of the Act were unconstitutional. I cannot imagine that this scenario is less likely than the alternative adopted by the Administration and followed in the Leary Siegler case. Indeed, although I have not pursued this issue in depth, it seems to me likely that the issues in a suit by an otherwise successful bidder, had the Administration complied with the Act, would be clearer than those in a suit by an unsuccessful bidder, who might have to establish both that the statute is constitutional and that it would have received the contract.

2. QUESTION: Generally the Federal courts accord a presumption of constitutionality to acts of Congress which they are called upon to review. However, the Supreme Court has ruled that some acts raise such fundamental questions, such as the basic tripartite structure of our government, that such a presumption will not be accorded.

A. Would you state whether you believe that there is a basis in the decisions of the court for not according a presumption of validity to the challenged provisions of the Competition in Contracting Act?

ANSWER: As indicated above, I believe that the term "presumption of constitutionality" is properly applied to the practice of taking into account the views of other branches on the constitutionality of legislation. In this sense a presumption of constitutionality always attaches to enacted legislation. I confess, however, that in my view it does not advance analysis to invoke such a presumption. What is always at issue is the underlying question of whether the enactment is indeed constitutional.

3. QUESTION: Which is the key issue in determining whether this Act violates the separation of powers doctrine: the organizational status of the General Accounting Office, the appointive process for the Comptroller General, or the nature of the functions to be performed by the Comptroller General under the Act?

A. If you find the appointment process dispositive, how, if at all, does the process for removing the Comptroller General affect your thinking on the matter?

B. The Justice Department contends that "the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress." The Department also states that, although the President appoints the Comptroller General, he "has no statutory right to remove the Comptroller General, even for cause." The CG may be removed, of course, by joint resolution of the Congress, and a joint resolution cannot take effect unless it is signed by the President or re-passed over his veto. Does this provision of law constitute authority for the President to remove the Comptroller General from office or does the President have any other explicit or implicit authority to remove him?

(If yes) By what authority may he remove the Comptroller General and subject to what, if any, conditions?

(If no) If the President may not remove the Comptroller General does this call into question his status as an "Officer of the United States," and thus validate the Justice Department's claim that the separation of powers doctrine has been violated?

ANSWER: My testimony sketches my views on this question. The Administration's position that the Comptroller General is part of the legislative branch oversimplifies a complex question, and ignores the development in the twentieth century of a variety of administrative agencies that do not fit neatly into the tripartite scheme on which the Administration relies. The fundamental issue is a functional one: Would according the Comptroller General the power at issue unjustifiably diminish executive authority and unjustifiably enhance congressional authority? As I stated in my testimony, the provisions regarding the appointment of the Comptroller General, and the functions of the office, rather strongly suggest that the Comptroller General should be regarded as sufficiently independent of Congress to allow him to do what the Competition in Contracting Act authorizes. Although the provisions regarding the removal of the Comptroller General point in the opposite direction, I believe that on balance the office has sufficient independence to undermine the Administration's claim. For an additional comment, see answer to question 10 below.

4. QUESTION: In 1980, then-Attorney General Benjamin Civiletti responded in writing to questions posed by Senator Max Baucus concerning the legal authority supporting the Justice Department's assertion that it can deny the validity of acts of Congress. In that letter, the Attorney General cited the case of Myers v. U.S., and said,

Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts: He cannot be required to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

Do you agree with this statement by Attorney General Civiletti?

5. QUESTION: Civiletti went on to say in that letter, however, if I may paraphrase his statement, that if the President defies an act of Congress, his action will be condemned if the act is ultimately upheld. His own views regarding the legality or desirability of the statute do not suspend its operation and do not immunize his conduct from judicial control. He may not lawfully defy an act of Congress if the act is constitutional. This was the teaching of the near sequel of Myers, Humphrey's Executor v. U.S.....In those rare instances in which the Constitution that dispenses with the operation of the statute. The Executive cannot.

Do you agree with this statement by Attorney General Civiletti?

4. and 5. ANSWER: I believe that my answers to questions 4 and 5 by Chairman Brooks adequately indicate my views on this question. As a matter of abstract theory, and in appropriate cases of which Myers may be one, Attorney General Civiletti's statement is unobjectionable. But, as I have indicated, the present situation is not one in which a policy of nonenforcement on constitutional grounds is appropriate.

6. QUESTION: I would now like to ask some questions regarding the decision of the Executive not to execute the stay and fee provisions of the Act.

A. In INS v. Chadha, at footnote 13, the Supreme Court stated that "...it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." This statement followed the Court's assertion that "The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review."

Do you believe that a President, when presented with a bill which contains provisions he believes to be unconstitutional, has an obligation to veto the bill? If not, under what circumstances do you feel that a President is justified in signing into law a bill containing provisions he believes to be unconstitutional? (Are there any general principles which might be derived and applied?)

ANSWER: Sometimes an objectionable provision is included as part of a package of provisions the remainder of which the President strongly believes should be enacted. It would be inconsistent with the constitutional order to allow maneuvering in Congress so as to create such a package, to determine for all time the President's ability to challenge the constitutionality of the objectionable provision. Perhaps it would be possible to state a general principle that would preclude, or substantially weaken, a later challenge by the President to the provision's constitutionality unless it could be shown that the overall package served essential public purposes. But I doubt that such a general principle is necessary. All that is needed, and what I believe is appropriate, is a principle that requires a President to enforce legislation he or she has signed, pending a judicial determination of its constitutionality and subject to the two provisos--patent unconstitutionality and individual rights--mentioned above. Of course the Executive can take whatever position in litigation it believes is appropriate.

7. QUESTION: In the past, GAO performed its bid protest function based on its statutory authority to settle government accounts.

A. Are those two functions analogous; that is, can you say that the bid protest function as it is now established in the Competition in Contracting Act is any more intrusive on the functioning of the executive branch than the settlement of accounts function?

B. Does the authority granted to the Comptroller General in the Act to award costs and attorney fees present a question which is any more troubling than the stay provision in terms of its intrusiveness on the functions of the executive?

ANSWER: As I indicated in my testimony, I am not familiar enough with the details of the operation of the contracting process to offer any assistance on this question.

8. QUESTION: Is the reference to the Comptroller General by the Supreme Court in Buckley v. Valeo of any value in resolving the issue? The Court said there that the Federal Election Commission's attempt to analogize its members to the Comptroller General failed because the Comptroller General, unlike the original members of the FEC, is appointed by the President.

ANSWER: I agree with the Administration's position that a reference in passing in a footnote should not be taken to have strong implications about the proper view of the Comptroller General's status.

9. QUESTION: Would you explain the significance, if any, of the fact that the GAO, according to its enabling statute is an instrumentality "independent of the executive departments," rather than independent of the executive branch? Is GAO subject to direction by OMB?

ANSWER: Again a full expression of views should come from one more familiar than I with the GAO. On the face of the statute, the reference to "departments" rather than "the executive branch" would appear to support the position that the GAO is not an arm of Congress but is rather an independent agency.

10. QUESTION: Are there any Officers of the United States who are not removable by the President?

ANSWER: Removability of officers: Without doing extensive research I cannot offer a confident answer to this question. As a matter of principle, however, it seems to me clear that, if removability by the President is a characteristic of officers of the United States, Congress may enact legislation structuring that process in a variety of ways, as Humphrey's Executor rather clearly indicates. In particular, I do not find it troubling in this connection that the Comptroller General can only be removed by joint resolution presented to the President. The President's power to initiate removal seems to me sufficiently preserved by his or her ability to call upon political allies in Congress to present the appropriate resolutions to Congress.

11. QUESTION: Would you explain the basis for the presumption of constitutionality afforded acts of Congress by the courts, and the circumstances in which the Supreme Court has found it inapplicable when reviewing acts of Congress?

ANSWER: See answer to question 2 above.

12. QUESTION: I understand that the FAR provides for a stay of contract award or performance of a protested procurement similar to the stay mandated by CICA.

A. Would the possibility of obtaining a judicial determination of the constitutionality of the CICA stay provision be reduced by agency compliance with the FAR stay?

B. Doesn't the Justice Department's argument in accepting the FAR stay, but not the CICA stay, amount to this: a stay legislated by the executive branch is constitutional but a stay legislated by the legislative branch isn't?

ANSWER: I am not familiar enough with the contracting process to answer this question.

13. QUESTION: Assuming that there are certain circumstances which would justify a Presidential assent to legislation containing unconstitutional provisions, does the President's obligation under the Constitution to "take care that the Laws be faithfully executed" require him to implement the law notwithstanding his belief that it is unconstitutional?

A. Does the 1838 Supreme Court decision in *Kendall v. U.S.*, where the court said it would be a novel and "entirely inadmissible" construction of the Constitution to contend that the President's obligation to see the laws faithfully executed implies a power to forbid their execution, have any viability?

B. By what authority and under what circumstances, if any, may a President forbid implementation of legislation, passed by Congress and signed into law by that President?

ANSWER: See answers to questions 1 and 2 by Chairman Brooks.

14. QUESTION: Does it make any difference in your answer whether the Act of Congress in question was signed into law by the President refusing to implement it; that is, would a successor have any greater authority to refuse to implement or defend an act of Congress than the President who signed the measure into law?

ANSWER: As a matter of principle I do not think it relevant in general that one President signed legislation to which a successor objects, not conversely that the President now in office objects to legislation that he or she signed. The problem of legislative packages, discussed in my answer to question 6, reduces whatever "equitable" claims might be made against a President's objections to a statute he or she signed. In *Nixon v. Administrator, General Services Administration*, 433 U.S. 425 (1977), the Court mentioned by did not make analytic use of the fact that one President had signed, and another had defended the constitutionality of, legislation that a former President claimed would impair the continuing independence of the Presidency.

15. QUESTION: Regarding the reporting provision which Congress first enacted in 1978, requiring the Attorney General to notify the House of Representatives whenever it determines that it will refrain from defending or enforcing any provision of law enacted by the Congress on the grounds that it is unconstitutional: Can that provision be construed to infer authority in the President to refrain from defending or enforcing provisions of law enacted by the Congress?

ANSWER: As mentioned above, I believe that the Executive has inherent authority to take the position in litigation that a statute is unconstitutional. This authority derives from the "take care" clause and the oath of office. It is neither enhanced nor diminished by the notification provisions of the 1978 Act, which is designed to regularize the process by which Congress may act to support the constitutionality of challenged statutes.

ADDITIONAL QUESTIONS OF CHAIRMAN BROOKS
FOR PROFESSOR SANFORD LEVINSON

1. DOES THE PRESIDENT HAVE A ROLE UNDER THE CONSTITUTION IN ASSESSING THE CONSTITUTIONALITY OF LAWS?

The answer to this question must be affirmative, for the fundamental reason that the President under the Constitution pledges that he will, "to the best of my Ability, preserve, protect and defend the Constitution of the United States." Art. 2, §1, Clause 8. One of John Marshall's central arguments in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which established the doctrine of judicial review, was derived from his own oath of office, and that argument is no less strong for any other governmental official who recognize the principle of constitutional supremacy upon which our government is based.

2. WHAT MEANS DOES THE CONSTITUTION PROVIDE THE PRESIDENT TO ASSERT HIS CONSTITUTIONAL VIEWS REGARDING LAWS?

The principal means the Constitution gives the President to "defend the Constitution of the United States" against a putatively unconstitutional act of Congress is the veto power. Many would argue that this is the exclusive means as well, since the framers of the Constitution, in Article I, §7, Clause 2, specifically laid out the mechanisms for the veto, and the failure to lay out any alternatives is interpreted to mean that there are none.

The central problem I have with the exclusivity thesis derives from the development, especially in this century, of so-called "omnibus" legislation composed of many different parts that may be minimally, if at all, related to each other. Although the Constitution of 1787 did not adopt the practice found in many state constitutions of requiring that all sections of a piece of legislation be "germane" to one another, I think it a safe assertion that most early legislation followed this practice. Even "germaneness," of course, is not enough to guarantee any kind of simplicity in legislation. One thinks of the multi-sectioned Judiciary Act of 1789, at issue in Marbury.

Modern legislation is substantially different even from the Judiciary Act; much legislation, of which the Deficit Reduction Act of 1984 is a model example, is "omnibus," containing many provisions, some of them having little or nothing to do with one another. It is not unknown for Presidents to feel "blackmailed" into signing legislation containing sections thought to be unconstitutional because it has been attached, however non-germane, to vital legislation. Probably the most famous example is the fact situation in *Lovett v. United States*, 328 U.S. 303 (1946), where a rider dealing with three particular federal employees was attached to the Urgent Deficiency Appropriation Act of 1943, which financed American effort in World War II. Although President Roosevelt denounced

the rider as unconstitutional--and the Supreme Court later agreed--he felt constrained to sign the Bill because of its manifest importance. (It may also be relevant to note that he agreed in effect to enforce the rider, although the Executive refused to defend its constitutionality when the case was presented to the courts.)

At the very least, then, one can say that an additional means beyond the veto that is available to the President is the refusal affirmatively to defend the statute in a judicial test. This obviously falls short of the refusal to enforce the statute, about which I will have more to say immediately below.

3. IS THE EXECUTIVE'S ACTION--DIRECTING THE AGENCIES TO IGNORE THE LAW IN THIS INSTANCE--CONSISTENT WITH THE EXECUTIVE PROVISIONS IN THE CONSTITUTION REGARDING LAWMAKING?

The difficulty in answering this question comes from the use of the term "lawmaking." The basic argument of constitutional supremacy, as suggested by my reference to Marbury above, is that a statute passed by Congress or a state legislature that does not conform with the Constitution is thus not really "law." If one takes this approach, then the President's directive to ignore the statute does not involve "lawmaking."

Ironically, there is a much sounder basis for this kind of presidential action than the much more common policy-based exercise of executive discretion involving enforcement of Federal law. In refusing to enforce the Competition in Contracting Act, the President can at least make a plausible claim to be following his oath of office. On the other hand, the refusal, for example, vigorously to enforce anti-trust or environmental laws merely because he disagrees with the policy views of Congress is a far more pernicious exercise of "lawmaking." Congress addressed this problem in the Congressional Budget and Impoundment Control Act of 1974, but the opportunities for abusive exercise of discretion are still all-too-present, and there appears to be evidence that this Administration is more than willing to take advantage of many such opportunities.

4. WHAT DOES THE CONSTITUTION INDICATE ABOUT THE PRESIDENT'S DUTY TO ENFORCE THE LAWS?

Clearly the President has taken an oath to enforce the laws. And William Rehnquist, then an Assistant Attorney General, was surely correct in stating that it is "an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them." Rehnquist, Memorandum re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (1969), reprinted in Joint Hearings Before the Senate Ad Hoc

Subcommittee on Impounding of Funds of the Committee on Government Operations and the Subcommittee on Separation of Powers of the Committee on the Judiciary on S. 373, 93d Cong., 1st Sess. (1973), pp. 394-395. Yet the logical problem is the same as that outlined immediately above: What counts as a "law" made within constitutional boundaries?

5. ATTACHED ARE SEVERAL DOCUMENTS WHICH TOGETHER PRESENT THE ADMINISTRATION'S LEGAL JUSTIFICATION FOR THEIR ACTION IN ORDERING THE EXECUTIVE AGENCIES TO IGNORE CERTAIN PROVISIONS OF THE COMPETITION IN CONTRACTING ACT. WILL YOU PLEASE GIVE YOUR ASSESSMENT OF THESE LEGAL ARGUMENTS?

For reasons already given in my statement to the Committee, reprinted above, I continue to believe that the CICA is constitutional, and nothing in the Administration's own statements leads me to change my mind. I also continue to believe that no good-faith argument can be made that the CICA is "plainly" unconstitutional. The Attorney General insults the intelligence of his readers in making such a claim. At best, from the Administration's point of view, one can say that non-frivolous arguments can be made that the Act violates the separation of powers, though intellectual honesty should also compel them to admit that the arguments in favor of the Act's constitutionality are similarly non-frivolous. I do not believe that the arguments made by the Administration are likely to persuade a reviewing court.

I do believe, however, in the very specific circumstances posed by this controversy, that there may be some merit to the Administration's claim that judicial review will be more easily (or at least as easily) obtainable if they do not enforce the Act. This is scarcely clear, but the complexities of standing law, plus the practical disincentives involved in mounting expensive litigation, may make it marginally more likely that a losing bidder, who would otherwise wish to take advantage of the procedures established by the CICA, will sue and thus test the Administration's policy of non-enforcement.

QUESTIONS OF MR. HORTON
FOR PROFESSOR SANFORD LEVINSON

1. WOULD YOU EXPLAIN THE PROCEDURE BY WHICH A JUDICIAL DETERMINATION MIGHT BE OBTAINED ON THE CONSTITUTIONALITY OF BOTH PROVISIONS OF THE ACT WHICH THE EXECUTIVE HAS STATED IT WILL REFUSE TO DEFEND, THE STAY PROVISION AND THE AUTHORITY TO AWARD COSTS AND FEES?

A. IS THE LIKELIHOOD OF OBTAINING A PROMPT JUDICIAL DETERMINATION OF THE CONSTITUTIONALITY OF THE ACT ENHANCED, LESSENED, OR UNAFFECTED BY THE EXECUTIVE'S DECISION TO REFUSE TO IMPLEMENT THESE PROVISIONS? (THE ATTORNEY GENERAL'S LETTER OF NOVEMBER 21, 1984, STATES THAT "...THE DEPARTMENT'S DECISION...WILL BEST ASSURE A RAPID AND DEFINITIVE JUDICIAL RESOLUTION OF THESE CONSTITUTIONAL ISSUES.")

As indicated in my answer to the last question of Chairman Brooks, I think there is some possibility that it will in fact be easier to have litigation initiated through non-enforcement. However, I must emphasize that my fields of scholarship do not include federal jurisdiction and the mechanics of conducting litigation in those courts. My two colleagues who have testified, Eugene Gressman and Mark Tushnet, are among the most distinguished scholars in this field in the entire country, and I am happy to defer to their expertise in regard to this question.

2. GENERALLY THE FEDERAL COURTS ACCORD A PRESUMPTION OF CONSTITUTIONALITY TO ACTS OF CONGRESS WHICH THEY ARE CALLED UPON TO REVIEW. HOWEVER, THE SUPREME COURT HAS RULED THAT SOME ACTS RAISE SUCH FUNDAMENTAL QUESTIONS, SUCH AS THE BASIC TRIPARTITE STRUCTURE OF OUR GOVERNMENT, THAT SUCH A PRESUMPTION WILL NOT BE ACCORDED.

A. WOULD YOU STATE WHETHER YOU BELIEVE THAT THERE IS A BASIS IN THE DECISIONS OF THE COURT FOR NOT ACCORDING A PRESUMPTION OF VALIDITY TO THE CHALLENGED PROVISIONS OF THE COMPETITION IN CONTRACTING ACT?

It is a fundamental tenet of our system of government that members of Congress are presumed to be taking their own oaths of office seriously when they pass upon legislative proposals. Thus anyone challenging an Act of Congress has a heavy burden of persuasion when seeking a judicial determination that Congress has in fact violated the oath by passing unconstitutional legislation. In modern times, this burden of persuasion has been modified, and perhaps even shifted, when a specific statute has used a so-called "suspect classification," such as race, or inhibits the exercise of a so-called "fundamental right," such as freedom of speech (a right derived from the text of the First Amendment) or the right to vote (a right implied by the very nature of republican government). No case that I am familiar with extends this modification to

separation-of-powers controversies as such. Cases like Chadha clearly demonstrate that the presumption of constitutionality can be overcome, but I do not read Chadha to announce any special rule for analysis of separation-of-powers claims.

Even if one makes the argument that the presumption should be lessened in a separation-of-powers case because in effect Congress is acting as the judge of its own power relative to that of the Executive, that certainly does not justify any counter-presumption in favor of the Executive, who is just as self-interested. This line of argument at most counsels good-faith effort to seek judicial resolution of the controversy.

3. WHICH IS THE KEY ISSUE IN DETERMINING WHETHER THIS ACT VIOLATES THE SEPARATION OF POWERS DOCTRINE: THE ORGANIZATIONAL STATUS OF THE GENERAL ACCOUNTING OFFICE, THE APPOINTIVE PROCESS FOR THE COMPTROLLER GENERAL, OR THE NATURE OF THE FUNCTIONS TO BE PERFORMED BY THE COMPTROLLER GENERAL UNDER THE ACT?

A. IF YOU FIND THE APPOINTMENT PROCESS DISPOSITIVE, HOW, IF AT ALL, DOES THE PROCESS FOR REMOVING THE COMPTROLLER GENERAL AFFECT YOUR THINKING ON THE MATTER?

B. THE JUSTICE DEPARTMENT CONTENTS THAT "THE COMPTROLLER GENERAL IS UNQUESTIONABLY PART OF THE LEGISLATIVE BRANCH AND IS DIRECTLY ACCOUNTABLE TO CONGRESS." THE DEPARTMENT ALSO STATES THAT, ALTHOUGH THE PRESIDENT APPOINTS THE COMPTROLLER GENERAL, HE "HAS NO STATUTORY RIGHT TO REMOVE THE COMPTROLLER GENERAL, EVEN FOR CAUSE." THE CG MAY BE REMOVED, OF COURSE, BY JOINT RESOLUTION OF THE CONGRESS, AND A JOINT RESOLUTION CANNOT TAKE EFFECT UNLESS IT IS SIGNED BY THE PRESIDENT OR RE-PASSED OVER HIS VETO. DOES THIS PROVISION OF LAW CONSTITUTE AUTHORITY FOR THE PRESIDENT TO REMOVE THE COMPTROLLER GENERAL FROM OFFICE OR DOES THE PRESIDENT HAVE ANY OTHER EXPLICIT OR IMPLICIT AUTHORITY TO REMOVE HIM?

(IF YES) BY WHAT AUTHORITY MAY HE REMOVE THE COMPTROLLER GENERAL AND SUBJECT TO WHAT, IF ANY, CONDITIONS?

(IF NO) IF THE PRESIDENT MAY NOT REMOVE THE COMPTROLLER GENERAL, DOES THIS CALL INTO QUESTION HIS STATUS AS AN "OFFICER OF THE UNITED STATES," AND THUS VALIDATE THE JUSTICE DEPARTMENT'S CLAIM THAT THE SEPARATION OF POWER DOCTRINE HAS BEEN VIOLATED?.

I am inclined to think that the central question is indeed the appointment process, and no one can deny that the President initially names the Comptroller General, subject to confirmation by the Senate. 31 U.S.C. §703(a)(1). However, even if one prefers instead to focus on the issue of removal, I do not think that it changes the underlying analysis and the conclusion that the Competition in Contracting Act is constitutional.

It is true that the President cannot thereafter dismiss the Comptroller General, but limitation on the power of removal is found as well in regard to most members of the so-called "independent agencies," such as the Federal Trade Commission, to name only one. The Chairman of the F.T.C. is not deprived of his status as an "officer of the United States" merely because he cannot be deprived of his office by a President who might have come to regret his initial appointment (or the appointment by a predecessor). It is true, however, that the President can attempt to dismiss a member of an "independent" agency for cause, though this has in fact rarely been attempted; moreover, no such attempt, as in President Reagan's effort to remove Mary Berry from the Civil Rights Commission, has been fully adjudicated so as to generate a judicial opinion defining the President's powers.

A colleague of mine at the University of Texas Law School has suggested that 31 U.S.C. §703(3)(1) is not at all dispositive concerning any inherent powers the President has under Article II of the Constitution to remove officials of the government at least "for cause." Presumably, a President could attempt to remove a Comptroller General by providing evidence of malfeasance or the other "for cause" grounds. The Comptroller General could defend on the grounds that the statute sets out the exclusive mode of removal, and at that point a court could resolve this issue.

It must be emphasized that this issue remains open even after *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), for in that case President Roosevelt specifically disavowed making any reflection on the personal merits of William Humphrey, who had been appointed by President Hoover to the Federal Trade Commission. Instead, President Roosevelt stated simply "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection." At 618. The facts were similar in the other modern "removal" case, *Wiener v. United States*, 357 U.S. 349 (1958), where President Eisenhower again claimed the right to replace one of President Truman's selections with a person of his own choosing on the War Claims Commission. No court has ever held, however, that a President can be prevented by Congress from removing an appointed "officer of the United States" who can in fact be shown to have breached the duties of his or her office. Moreover, the classic case of *Myers v. United States*, 272 U.S. 52 (1926), however much modified by these later cases, still stands for the proposition that the President has inherent power to remove "purely executive officers," as distinguished from members of independent agencies or quasi-judicial commissions like the F.T.C. or the War Claims Commission.

31 U.S.C. §703(3)(1) limits congressional discretion to remove the Comptroller General and the Deputy Comptroller General, insofar as grounds for removal are limited to

permanent disability, inefficiency, neglect of duty, malfeasance, or a felony or conduct involving moral turpitude. Moreover, notice and opportunity for a hearing must be given. This scarcely constitutes "at will" employment; moreover, as a practical matter, of course, Congress has never attempted to remove a Comptroller General.

As outlined in my initial statement, a theory of separation of powers developed on a notion of three (and only three) branches of government has had great trouble coming to terms with the reality of many analysts would term a fourth branch called the modern bureaucratic state. The Comptroller General and the General Accounting Office are best analyzed as components of this state rather than as simple satraps of Congress, however accurate it may be in some respects to view them as significantly linked to the Congress. It is obvious on both legal and practical grounds that Congress has little more effective power than does the President to dismiss a Comptroller General. Not only must both Houses of Congress pass a resolution of dismissal, but the President must accede to the resolution. This surely protects the Comptroller General's independence sufficiently to prevent his being viewed as an agent of the Congress.

4. IN 1980, THEN-ATTORNEY GENERAL BENJAMIN CIVILETTI RESPONDED IN WRITING TO QUESTIONS POSED BY SENATOR MAX BAUCUS CONCERNING THE LEGAL AUTHORITY SUPPORTING THE JUSTICE DEPARTMENT'S ASSERTION THAT IT CAN DENY THE VALIDITY OF ACTS OF CONGRESS. IN THAT LETTER, THE ATTORNEY GENERAL CITED THE CASE OF MYERS V. U.S., AND SAID,

"MYERS HOLDS THAT THE PRESIDENT'S CONSTITUTIONAL DUTY DOES NOT REQUIRE HIM TO EXECUTE UNCONSTITUTIONAL STATUTES; NOR DOES IT REQUIRE HIM TO EXECUTE THEM PROVISIONALLY, AGAINST THE DAY THAT THEY ARE DECLARED UNCONSTITUTIONAL BY THE COURTS: HE CANNOT BE REQUIRED TO RETAIN POSTMASTERS AGAINST HIS WILL UNLESS AND UNTIL A COURT SAYS THAT HE MAY LAWFULLY LET THEM GO. IF THE STATUTE IS UNCONSTITUTIONAL, IT IS UNCONSTITUTIONAL FROM THE START."

DO YOU AGREE WITH THIS STATEMENT BY ATTORNEY GENERAL CIVILETTI?

This question raises basic problems of what might be called "constitutional metaphysics." If one believes that the judiciary "finds" the instead of "creating" it, then the law is indeed "unconstitutional from the start." Indeed, the judicial authority under this view is derived from its ability to recognize the constitutionality or unconstitutionality of laws, but, at least theoretically, the constitutional status is independent of judicial recognition. To argue otherwise is ultimately to adopt a theory that says that the basis of law--including a declaration of unconstitutionality--is the court's decision itself. Among other problems with this theory is the incoherence it leads to in trying to determine what it can mean for judges to be faithful to their constitutional oaths.

Further problems arise from the reality that constitutional interpretation is an extraordinarily complex process. At the very least, for example, several years may intervene between the passage of an Act and adjudication by a court, and actions may be taken in reliance on the Act (and its presumed constitutionality). Moreover, of course, one Supreme Court may decide that an Act is constitutional only to be overruled at some later date by another group of Justices. It seems entirely too academic to say that the law in question was "never" constitutional.

In *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940), the Supreme Court addressed a variant of this problem, when it applied the doctrine of *res judicata* in regard to an unappealed decision applying the Municipal Bankruptcy Act even though a subsequent decision by the Court in another case held the Act unconstitutional:

The courts below have proceeded on the theory that the act of congress having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. [Citations omitted.] It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects--with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, or public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal....

This statement, of course, refers to the consequences attendant on enforcement of a statute later found to be unconstitutional. Here the enforcing agency is refusing to enforce it from the start, however, so that the Chicot problem does not present itself.

In any case, I think there is undoubted merit to Attorney General Civiletti's statement.

5. CIVILETTI WENT ON TO SAY IN THAT LETTER, HOWEVER, IF I MAY PARAPHRASE HIS STATEMENT, THAT IF THE PRESIDENT DEFIES AN ACT OF CONGRESS, HIS ACTION WILL BE CONDEMNED IF THE ACT IS ULTIMATELY UPHOLD. HIS OWN VIEWS REGARDING THE LEGALITY OR DESIRABILITY OF THE STATUTE DO NOT SUSPEND ITS OPERATION AND DO NOT IMMUNIZE HIS CONDUCT FROM JUDICIAL CONTROL. HE MAY NOT LAWFULLY DEFY AN ACT OF CONGRESS IF THE ACT IS CONSTITUTIONAL. THIS WAS THE TEACHING OF THE NEAR SEQUEL OF MYERS, HUMPHREY'S V. U.S. . . . IN THOSE RARE INSTANCES IN WHICH THE EXECUTIVE MAY LAWFULLY ACT IN CONTRAVENTION OF A STATUTE, IT IS THE CONSTITUTION THAT DISPENSES WITH THE OPERATION OF THE STATUTE. THE EXECUTIVE CANNOT.

DO YOU AGREE WITH THIS STATEMENT BY ATTORNEY GENERAL CIVILETTI?

I do believe that Attorney General Civiletti accurately describes the basis theory of constitutional supremacy.

6. I WOULD NOW LIKE TO ASK SOME QUESTIONS REGARDING THE DECISION OF THE EXECUTIVE NOT TO EXECUTE THE STAY AND FEE PROVISIONS OF THE ACT:

A. IN INS V. CHADHA, AT FOOTNOTE 13, THE SUPREME COURT STATED THAT " . . . IT IS NOT UNCOMMON FOR PRESIDENTS TO APPROVE LEGISLATION CONTAINING PARTS WHICH ARE OBJECTIONABLE ON CONSTITUTIONAL GROUNDS." THIS STATEMENT FOLLOWS THE COURT'S ASSERTION THAT "THE ASSENT OF THE EXECUTIVE TO A BILL WHICH CONTAINS A PROVISION CONTRARY TO THE CONSTITUTION DOES NOT SHIELD IT FROM JUDICIAL REVIEW."

DO YOU BELIEVE THAT A PRESIDENT, WHEN PRESENTED WITH A BILL WHICH CONTAINS PROVISIONS HE BELIEVES TO BE UNCONSTITUTIONAL, HAS AN OBLIGATION TO VETO THE BILL? IF NOT, UNDER WHAT CIRCUMSTANCES DO YOU FEEL THAT A PRESIDENT IS JUSTIFIED IN SIGNING INTO LAW A BILL CONTAINING PROVISIONS HE BELIEVES TO BE UNCONSTITUTIONAL? (ARE THERE ANY GENERAL PRINCIPLES WHICH MIGHT BE DERIVED AND APPLIED?)

I do not believe that there are any genuinely useful general principles to apply in answering this question. If the only costs of a veto are "political" in the narrow sense of disappointing Congress or a constituency that favors a statute, then a President clearly has a duty to veto it if he believes it to be unconstitutional. As already suggested in my answers to Chairman Brooks' questions and in my statement, however, reality is rarely so simple. One cannot expect a President to veto a bill if the costs include significant damage to necessary (and constitutional) programs of the government. At that point an honorable President may well choose to sign a bill and, at the least, thereafter refuse to defend the purportedly unconstitutional aspect of the legislation if it challenged before a court.

7. IN THE PAST, GAO PERFORMED ITS BID PROTEST FUNCTION BASED ON ITS STATUTORY AUTHORITY TO SETTLE GOVERNMENT ACCOUNTS.

A. ARE THOSE TWO FUNCTIONS ANALOGOUS: THAT IS, CAN YOU SAY THAT THE BID PROTEST FUNCTION AS IT IS NOW ESTABLISHED IN THE COMPETITION IN CONTRACTING ACT IS ANY MORE INTRUSIVE ON THE FUNCTIONING OF THE EXECUTIVE BRANCH THAN THE SETTLEMENT OF ACCOUNTS FUNCTION?

B. DOES THE AUTHORITY GRANTED TO THE COMPTROLLER GENERAL IN THE ACT TO AWARD COSTS AND ATTORNEY FEES PRESENT A QUESTION WHICH IS ANY MORE TROUBLING THAN THE STAY PROVISION IN TERMS OF ITS INTRUSIVENESS ON THE FUNCTIONS OF THE EXECUTIVE?

I am reluctant to answer this question insofar as it calls for more detailed knowledge of the actual operations of the General Accounting Office than I have. My inclination is to say that the lifting of the stay is not at all intrusive, especially because the alternative--no lifting--would be far worse in making it impossible to carry out contracts thought to be needed for national security reasons. The awarding of fees can be said to be intrusive insofar as by definition it would require the paying out of funds not specifically budgeted, though any agency could easily be expected in the future to include in its budget some funds set aside for anticipated fee awards.

8. IS THE REFERENCE TO THE COMPTROLLER GENERAL BY THE SUPREME COURT IN BUCKLEY V. VALEO OF ANY VALUE IN RESOLVING THE ISSUE? THE COURT SAID THERE THAT THE FEDERAL ELECTION COMMISSION'S ATTEMPT TO ANALOGIZE ITS MEMBERS TO THE COMPTROLLER GENERAL FAILED BECAUSE THE COMPTROLLER GENERAL, UNLIKE THE ORIGINAL MEMBERS OF THE FEC, IS APPOINTED BY THE PRESIDENT.

For reasons given in my original statement, I do indeed believe that the comment of the Supreme Court in Buckley helps to resolve the issue in favor of the constitutionality of the CICA.

9. WOULD YOU EXPLAIN THE SIGNIFICANCE, IF ANY, OF THE FACT THAT THE GAO, ACCORDING TO ITS ENABLING STATUTE IS AN INSTRUMENTALITY "INDEPENDENT OF THE EXECUTIVE DEPARTMENTS", RATHER THAN INDEPENDENT OF THE EXECUTIVE BRANCH? IS GAO SUBJECT TO DIRECTION BY OMB?

Again I must admit insufficient knowledge of the operation of the Executive Branch to be able to answer this question, although my impression is that the GAO is not subject to direction by OMB. This certainly underscores the extent to which the GAO is only minimally subject to any direction by the Executive Branch. However, as a colleague of mine at the University of Texas Law School has pointed out, some of the same anomalies, in terms of traditional theories of separation-of-powers, are presented by the Federal Reserve Board.

10. ARE THERE ANY OFFICERS OF THE UNITED STATES WHO ARE NOT REMOVABLE BY THE PRESIDENT?

Yes, the Vice President of the United States is unequivocally and without a doubt not removable by the President, at least under present understandings of the Constitution. The only way a Vice President can be removed is by impeachment.

11. WOULD YOU EXPLAIN THE BASIS FOR THE PRESUMPTION OF CONSTITUTIONALITY AFFORDED ACTS OF CONGRESS BY THE COURTS, AND THE CIRCUMSTANCES IN WHICH THE SUPREME COURT HAS FOUND IT INAPPLICABLE WHEN REVIEWING ACTS OF CONGRESS?

Please see my answer to question 2 above.

12. I UNDERSTAND THAT THE FAR REGULATIONS PROVIDE FOR A STAY OF CONTRACT AWARD OR PERFORMANCE OF A PROTESTED PROCUREMENT SIMILAR TO THE STAY MANDATED BY CICA.

(1) WOULD THE POSSIBILITY OF OBTAINING A JUDICIAL DETERMINATION OF THE CONSTITUTIONALITY OF THE CICA STAY PROVISION BE REDUCED BY AGENCY COMPLIANCE WITH THE FAR STAY?

My answer to question 1 above explains my inability to answer this question with confidence.

(2) DOESN'T THE JUSTICE DEPARTMENT'S ARGUMENT IN ACCEPTING THE FAR STAY, BUT NOT THE CICA STAY, AMOUNT TO THIS: A STAY LEGISLATED BY THE EXECUTIVE BRANCH IS CONSTITUTIONAL BUT A STAY LEGISLATED BY THE LEGISLATIVE BRANCH ISN'T?

I think this is a fair characterization of the argument of the Department of Justice, subject to the following caveat: It would presumably deny that a FAR stay is "legislation" for reasons outlined in footnote 16 of I.N.S. v. Chadha, 103 S.Ct. 2764, 2785 (1983): "To be sure, some administrative agency action--rule making--, for example--may resemble 'lawmaking.'...This Court has referred to agency activity as being 'quasi-legislative' in character....When the Attorney General performs his duties pursuant to [a statute], he does not exercise 'legislative power. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214....Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require...."

I think it understandable if one regards this kind of argument as "metaphysical" or purely "semantic"; nevertheless, it provides the reason why no one disputes the fact that an executive agency can engage in the very same activity challenged when done by the Comptroller General.

13. ASSUMING THAT THERE ARE CERTAIN CIRCUMSTANCES WHICH WOULD JUSTIFY A PRESIDENTIAL ASSENT TO LEGISLATION CONTAINING UNCONSTITUTIONAL PROVISIONS, DOES THE PRESIDENT'S OBLIGATION UNDER THE CONSTITUTION TO "TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED" REQUIRE HIM TO IMPLEMENT THE LAW NOTWITHSTANDING HIS BELIEF THAT IT IS UNCONSTITUTIONAL?

(1) DOES THE 1838 SUPREME COURT DECISION IN KENDALL V. U.S., WHERE THE COURT SAID IT WOULD BE A NOVEL AND "ENTIRELY INADMISSIBLE" CONSTRUCTION OF THE CONSTITUTION TO CONTEND THAT THE PRESIDENT'S OBLIGATION TO SEE THE LAWS FAITHFULLY EXECUTED IMPLIES A POWER TO FORBID THEIR EXECUTION, HAVE ANY VIABILITY?

(2) BY WHAT AUTHORITY AND UNDER WHAT CIRCUMSTANCES, IF ANY, MAY A PRESIDENT FORBID IMPLEMENTATION OF LEGISLATION, PASSED BY CONGRESS AND SIGNED INTO LAW BY THAT PRESIDENT?

Please see my answers to Questions 1-4 of Chairman Brooks.

14. DOES IT MAKE ANY DIFFERENCE IN YOUR ANSWER WHETHER THE ACT OF CONGRESS IN QUESTION WAS SIGNED INTO LAW BY THE PRESIDENT REFUSING TO IMPLEMENT IT: THAT IS, WOULD A SUCCESSOR HAVE ANY GREATER AUTHORITY TO REFUSE TO IMPLEMENT OR DEFEND AN ACT OF CONGRESS THAN THE PRESIDENT WHO SIGNED THE MEASURE INTO LAW?

I am inclined to disregard any differences between the signing President and a successor. Each, of course, takes the oath of office, and one President cannot bind a successor for the very same reason that one Supreme Court cannot bind its successor. Previous determinations are entitled to great respect; perhaps one even wants to say, as with precedent in general, that previous decisions ought not be overruled unless one believes that they were clearly erroneous. But it is simply not a part of our own constitutional scheme that decisions cannot be overruled at all.

15. REGARDING THE REPORTING PROVISION WHICH CONGRESS FIRST ENACTED IN 1978, REQUIRING THE ATTORNEY GENERAL TO NOTIFY THE HOUSE OF REPRESENTATIVES WHENEVER IT DETERMINES THAT IT WILL REFRAIN FROM DEFENDING OR ENFORCING ANY PROVISION OF LAW ENACTED BY THE CONGRESS ON THE GROUNDS THAT IT IS UNCONSTITUTIONAL: CAN THAT PROVISION BE CONSTRUED TO INFER AUTHORITY IN THE PRESIDENT TO REFRAIN FROM DEFENDING OR ENFORCING PROVISIONS OF LAW ENACTED BY THE CONGRESS?

P.L. 96-132, §21, 93 Stat. 1049, 28 U.S.C. §519(a) reads as follows:

(a) The Attorney General shall...transmit a report to each house of the Congress in any case in which the Attorney General

(1) establishes a policy to refrain from the enforcement of any provision of law enacted by the Congress, the enforcement of which is the responsibility of the Department of Justice, because of the position of the Department of Justice that such provision of law is not constitutional; or

(2) determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress...because of the position of the Department of Justice that such provision is not constitutional.

\$519(a)(1) does seem to contemplate the refusal of the Executive Branch to enforce a statute passed by Congress on the grounds of its unconstitutionality. This is, of course, a much more extensive power than the long-established authority of the Executive to refuse to defend a law before the judiciary that is recognized by the terms of \$519(a)(2). I must emphasize that any authority held by the President to refuse to enforce a statute comes from the Constitution itself, i.e., the oath of office, rather than from authorization by Congress, which cannot empower a President to engage in an activity barred by the Constitution.



THE UNIVERSITY OF NORTH CAROLINA
AT
CHAPEL HILL

SCHOOL OF LAW

April 12, 1985

The University of North Carolina at Chapel Hill
Van Hecke-Wettach Hall 064 A
Chapel Hill, North Carolina 27514

Representative Jack Brooks, Chairman
Legislation and National Security Subcommittee
House Committee on Government Operations
2157 Rayburn House Office Building
Washington, D. C. 20515

Dear Mr. Chairman:

I write in response to certain follow-up questions posed subsequent to my testimony before the Subcommittee on February 28, 1985. At that hearing, I expressed my view that the Executive has no constitutional authority to refuse to execute certain provisions of the Competition in Contracting Act ("CICA"), which was duly enacted into law in 1984 as Pub.Law 98-369, 98 Stat. 494. On the contrary, Section 3 of Article II of the Constitution -- which commands that the Executive "shall take Care that the Laws be faithfully executed" -- makes it the constitutional duty of the Executive to execute the provisions of this particular Act. There is nothing in Article II that excuses the President from the obligation of faithful execution because of any question he may harbor as to the constitutionality of CICA or any portion thereof.

I. The Constitutional Basis for the GAO Bid Protest System

Before addressing the specific questions raised by the Subcommittee, I feel it appropriate to comment briefly on the constitutional objections that are said to justify the Executive's refusal to obey certain CICA provisions. Those provisions are: (1) the provisions of revised 31 U.S.C. § 3553(c) and (d), the codified versions of CICA, that require a procuring agency to suspend or "stay" any procurement if a bid protest is filed with the Comptroller General, said stay to be lifted when the Comptroller General issues his decision on the bid protest; and (2) the provisions of revised 31 U.S.C. § 3554(c), which authorize the Comptroller General to declare that successful bid protestors are entitled to attorney's fees and bid preparation costs, to be paid promptly by the agency involved.

As expressed by the Attorney General and the Department of Justice, the constitutional complaint is that the foregoing provisions purport to authorize the Comptroller General, described as an agent of the Legislative Branch, to tread upon the Executive's day-by-day execution of CICA and thereby to perform executive functions in violation of the separation of powers doctrine. In

reliance on INS v. Chadha, 462 U.S. 919 (1983), the Attorney General concludes that the unconstitutionality of these provisions is "indisputable." In my judgment, quite the opposite is true.

(1) Constitutional analysis of any Congressional statute must start with an understanding of the constitutional power or end that Congress seeks to implement by the enactment of the statute. In this instance, the obvious purpose of CICA and its GAO bid protest system is to implement and execute the vested Congressional "power of inquiry," the power that is deemed "an essential and appropriate auxiliary to the legislative function." McGrain v. Daugherty, 273 U.S. 135, 174 (1927). And the scope of that power of inquiry "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Barenblatt v. United States, 360 U.S. 109, 111 (1959).

(2) Put differently, the Congressional power of inquiry is co-extensive with the Congressional power of legislating. There can be no question, and none is raised by the Attorney General, that Congress has constitutional power to legislate respecting procedures and policies to be followed by Executive Branch agencies and officers possessing statutory procurement authorization. It necessarily follows that Congress has a complementing "power of inquiry" into such procedures and policies, inasmuch as Congress "cannot legislate wisely or effectively [regarding possible changes or improvements in procurement procedures and policies] in the absence of information respecting the conditions which the legislation is intended to affect or change." McGrain v. Daugherty, 273 U.S. at 175.

(3) Assuming, as we must, that Congress or either House can inquire into the Executive Branch's execution of statutory procurement policies, the next question is how Congress may execute this power of inquiry. Must the power be exercised by Congress itself, or may it be delegated to a committee of either House, or may it be delegated to some agency or officer acting on behalf of the Congress or the Government of the United States? With respect to an officer or agency acting on behalf of the Congress, that question received a definitive answer in Buckley v. Valeo, 424 U.S. 1, 137 (1976):

Insofar as the powers confided in the Commission [or the Comptroller General] are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission [or the Comptroller General] . . . may exercise them. Kilbourn v. Thompson, 103 U.S. 168 (1881); McGrain v. Daugherty, 273 U.S. 135 (1927); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

(4) Up to this point, I have assumed -- as the Attorney General assumes -- that the Comptroller General is an agent or an arm of Congress and directly accountable to the Congress. See 61 Cong. Rec. 1080 (1921) (remarks of Rep. Good, at the time of creating the office, that the Comptroller General "is to be the arm of Congress"). At the same time, consistently since the establishment of the office in the Budget and Accounting Act of 1921, 42 Stat. 23, Congress has made it clear that the General Accounting Office, headed by the Comptroller General, is "an instrumentality of the United States Government independent of the executive departments" and that the Comptroller General is to be "appointed by the President, by and with the advice and consent of the Senate." See 31 U.S.C. §§ 702(a), 703(a)(1), 96 Stat. 887, 888 (1982). What this means is that the Comptroller General

occupies a dual position and performs a two-fold function. First, he makes investigations of matters relating to the receipt, disbursement and application of public funds, and reports the results of his scrutiny to the Congress with appropriate recommendations. In addition, he pursues investigations that may be ordered by either House of Congress, or by any Committee of either House in matters relating to revenue, appropriations or expenditures . . . In performing these functions the status of the Comptroller General is that of an officer of the legislative branch of the Government. . . .

The Comptroller General has also a second status as the chief accounting officer of the Government. His second principal function is that of approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned . . . This is an executive function and in performing it the Comptroller General acts as a member of the Executive branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive functions. Humphrey's Executor v. United States, 295 U.S. 602 (1935). Cf. Myers v. United States, 272 U.S. 52 (1926). Thus we have developed in comparatively recent years a fourth type of Government agency, -- one that combines two kinds of basic powers. [United States ex rel. Brookfield Construction Co. v. Stewart, 234 F.Supp. 94, 99-100 (D.C.D.C. 1964), *aff'd*, 339 F.2d 753 (D.C.Cir. 1964)(*per curiam*).]

See also Buckley v. Valeo, 424 U.S. at 128 n. 165, which recognizes that while the Comptroller General may be a "legislative officer" with respect to certain functions, he is also appointed by the President in conformity with the Appointments Clause and therefore is an "Officer of the United States."

(5) The Attorney General seemingly does not recognize this dual role of the Comptroller General or the capacity of the GAO, as an independent agency of the "fourth branch" variety, to receive and execute whatever quasi-legislative, quasi-executive or quasi-judicial functions Congress may impose on it. The critical constitutional question is therefore misstated by the Attorney General. That question is not whether the Comptroller General, considered solely as an arm of Congress in terms of its "power of inquiry,"

may perform exclusively executive or judicial powers. Rather, the question is whether Congress, in pursuit of its acknowledged "power of inquiry," may call upon the Comptroller General or the GAO to perform certain functions, arguably of an executive or judicial nature (perhaps softened by a "quasi"), in order to inform Congress as to whether the departments and agencies are complying with the statutory law respecting competitive procurement bidding.

(6) So stating the question, the constitutional answer is clear. Pursuant to its constitutional power to enact "necessary and proper" legislation in implementation of its "power of inquiry," Congress has enacted the challenged CICA provisions, approved and signed (however reluctantly) by the President. Those provisions, in the Attorney General's eyes, give the GAO: (a) the executive function of determining of when a procurement may proceed, following the statutory direction that a procurement shall be stayed pending a protest to the GAO; and (b) the judicial function of awarding costs and attorney's fees to the successful protestant, to be paid by the agency involved. Even assuming the Attorney General's self-serving descriptions of these two GAO functions are correct, although both functions must be conditioned by a "quasi," there can be no question as to the constitutional legitimacy of such delegations. These are simply functions to be "exercised free from day-to-day supervision of either Congress or the Executive Branch . . . [and] are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. . . . Such functions may be discharged only by persons who are 'Officers of the United States.'" Buckley v. Valeo, 424 U.S. at 139-140. As the Buckley decision noted, the Comptroller General is just such an officer.

(7) From another perspective, Congress has simply delegated to a unique federal agency -- designed primarily to aid the Congress in its power of inquiry into the operations of the Federal Government, and secondarily to act as the chief accounting office of the Government -- certain quasi-executive and quasi-judicial powers to ferret out current problems in the administration of federal procurement policies. CICA gives the Comptroller General no enforcement powers respecting bid awards; he issues no mandatory orders enforceable in courts. He merely makes non-binding recommendations to the agency involved, and failure to comply with recommendations can result only in a report to Congress by the GAO. Thus the provisions regarding the lifting of stays and the award of costs are simply auxiliary to and an integral part of the investigating power delegated to the GAO by CICA. Congress has done no more than vest in the GAO certain quasi-executive and quasi-judicial powers deemed "necessary and proper" in aid of the Congressional "power of inquiry." What Congress has delegated to the GAO in CICA is no more unconstitutional than existing delegations of quasi-legislative, quasi-executive and quasi-judicial powers to the SEC, the NLRB, or numerous other independent agencies.

(8) The Attorney General places ultimate reliance for his position upon a statement in INS v. Chadha that one House of Congress by itself cannot take action that has "the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." Taking that

statement out of the "one-House veto" context and assuming that the Comptroller General is solely the alter ego of Congress, the Attorney General argues that the Legislative Branch cannot itself alter the legal rights, duties and relations of other persons -- such as the procurement bidders -- by exercising executive and judicial powers. Presumably, within the ambit of a given statute, only the Executive or the Judiciary can alter such legal relationships.

(9) That argument of the Attorney General proves too much. It is premised not only on an unduly narrow view of the Comptroller General's role but also on an unrealistic notion of the separation of powers principle in the context of delegated authority. Indeed, the effectiveness of modern government demands that a "quasi" combination of legislative, executive and judicial functions be delegated to administrative agencies and officers. Such delegation is what administrative law, the "fourth branch" of government, is all about. In the Supreme Court's words, "common sense and the inherent necessities of the governmental co-ordination," Hampton & Co. v. United States, 276 U.S. 394, 406 (1928), preclude application of a rigid separation of powers requirement to the world of administrative government. Delegating administrative authority to an administrator or an administrative agency, wherever placed in governmental organization charts, is an exercise in "blending rather than separating the three kinds of powers." 1 K. Davis, Administrative Law Treatise 72 (2d ed. 1978). To accept the thesis of the Attorney General, to insist that the Comptroller General may not exercise any delegated authority that may "alter the legal rights, duties and relations" of others, is to deny the constitutionality of virtually the whole of the processes of administering, executing and overseeing laws by delegation of authority.

(10) Finally, I return to the basic constitutional base of the GAO bid protest system written into CICA. Every function delegated to the Comptroller General in the challenged provisions is designed to advise and aid the Congress in determining whether the present competitive bid procedures are adequate or whether new legislation may be necessary. In short, these provisions simply implement the Congressional power of inquiry. They are the means Congress deems "necessary and proper" to effectuate its inquiry into the competitive bid processes. And I fail to find any other provision in the Constitution, including the potent but unwritten separation of powers doctrine, that "imperiously" prohibits the selection of these means. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 408 (1819). Certainly the Attorney General has pointed to no such prohibition. The bottom line is that the Constitution permits Congress, in executing its great power of inquiry, to call upon the Comptroller General to assist in that execution and to delegate to him certain quasi-executive and quasi-judicial functions deemed "necessary and proper" to make an effective inquiry into the procurement system.

II. The Role of the President in Assessing the Constitutionality of Laws

Against the backdrop of the foregoing statement of my belief that the Attorney General is mistaken in asserting the invalidity of the CICA provisions in question, I turn now to the specific questions raised by the Chairman of this Committee and by Congressman Horton. Most of those questions relate to the role of the President in assessing the constitutionality of legislation, the faithful execution of which the President must "take care" to perform.

The Chairman's Question 1: Does the President have a role under the Constitution in assessing the constitutionality of laws? Answer: Yes. While it is ultimately and "emphatically the province and duty of the judicial department to say what the law is," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), both the Congress and the President have that "province and duty" when acting within the scope of their respective functions. Louis Fisher of the Congressional Research Service of the Library of Congress has recently shown that Members of Congress, in proposing, framing and adopting legislation, perform "an essential, broad, and ongoing role in shaping the meaning of the Constitution." Fisher, Constitutional Interpretation by Members of Congress, 63 N.C.L.Rev. 701, 702 (1985). That means, of course, that the Members must strive to conform their legislative proposals and actions to the Constitution. The same kind of role is performed by the President, particularly when he proposes or helps formulate legislation and when he approves or vetoes bills enacted by both Houses. Indeed, by virtue of his oath to "preserve, protect and defend the Constitution of the United States," the Executive is duty bound, to the best of his ability, to conform his official actions and proposals, as well as his "faithful" execution of the laws, to what he deems to be proper constitutional standards. And as stated in United States v. Nixon, 418 U.S. 683, 706 (1974), "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great deference."

The Chairman's Question 2: What means does the Constitution provide the President to assert his constitutional views regarding laws? Answer: The Constitution does not give express voice to the President's power to assert such views, but the means for such assertions are necessarily implicit in his vested power (Article II, Section 3) to recommend to Congress "such Measures as he shall deem necessary and expedient," in his vested power (Article I, Section 7) to approve or veto any bill that has passed both Houses, in his vested power (Article II, Section 3) to "take Care that the Laws be faithfully executed," and in his vested obligation (Article II, Section 1) to swear that he "will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." I should add that the President, when signing a bill passed by both Houses, may also express reservations about the constitutionality of some parts of the legislation, as he has done in this instance. In sum, the President enjoys many vehicles and occasions for expressing his constitutional views regarding legislation.

The Chairman's Question 3: Is the Executive's action -- directing the agencies to ignore the law in this instance -- consistent with the Executive provisions in the Constitution regarding lawmaking? Answer: No. While the Executive and his agents sometimes perform a kind of quasi-lawmaking function in the execution of delegated functions under a given statute, the Constitution gives the President no role or function in making or unmaking plenary laws. The Court's decision in Youngstown Co. v. Sawyer, 343 U.S. 579, 587 (1952), lays to rest any contention that the Constitution gives any lawmaking function to the President: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." Thus, in direct answer to this question, the constitutional provisions limiting the President's lawmaking role to recommending, approving or vetoing bills serve to invalidate the instant directive to all agencies to ignore the challenged provisions of CICA.

The Chairman's Question 4: What does the Constitution indicate about the President's duty to enforce the laws? Answer: Article II, Section 3, provides a very clear and unequivocal answer by stating that the President "shall take Care that the Laws be faithfully executed." As I have previously indicated, there are no constitutional excuses or justifications for not executing a duly enacted law; such failure to execute is the antithesis of "faithful" execution and truly amounts to a pro tanto repeal of the unexecuted portions. Since repeal of a law is purely a legislative function, the President oversteps his executive powers when he deliberately fails to execute. Moreover, the duty imposed on the President by the "take care" clause is an absolute one that "does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." Myers v. United States, 272 U.S. 52, 177 (1926)(Holmes, J., dissenting). Nor does the clause permit the President to execute less than what Congress has given him to execute. In short, a President does not "faithfully" execute a law by adding to, subtracting from, or refusing to execute that law.

The Chairman's Question 5: Will you please give your assessment of . . . the Administration's legal justification for [its] action in ordering the Executive agencies to ignore certain provisions of the Competition in Contracting Act? Answer: My assessment is negative. As I understand the Administration's position, defiance and non-execution of the CICA bid protest provisions are justified inasmuch as (1) these provisions being unconstitutional, they can neither bind the Executive Branch nor provide authority for Executive Branch actions; and (2) the decision not to comply "also has the coincidental and desirable effect of enhancing the potential for judicial review of the constitutional issues."

The first suggested justification, that the CICA provisions are invalid, has been treated and rejected in Part I of this document. But what is troubling about the Administration's position on this point is its view that the Executive is not bound by any statutory provision, and indeed lacks authority to enforce a provision, that the Executive deems unconstitutional as invading the Article II functions of the Executive. That is but another way

of saying that the Executive is freed of his Article II duty to execute the laws faithfully when he feels in good faith that a particular law is invalid -- a quite impermissible position. A President is quite free to express his constitutional objections in ways other than by violating his "take care" obligation. With respect to the second purported justification, that of enhancing the potential for judicial review, I can only say that it is not the duty or privilege of the President to refuse obedience to a law so as to speed the process of judicial review. The President is an agent selected by the people for the express purpose of seeing that the duly enacted laws are faithfully executed, not that questionable laws may be quickly assessed by the judiciary. There are any number of legitimate ways in which the validity of most laws can be tested by some private citizen with standing to object, but Executive disobedience is not one of them. In fact, Executive disobedience serves to add an unduly complicating dimension to the judicial review process, for then judicial review can be had only by the citizen injured by the Executive disobedience rather than by the citizen injured by the law itself.

Rep. Horton's Question 1: Would you explain the procedure by which a judicial determination might be obtained on the constitutionality of both provisions of the Act which the Executive has stated it will refuse to defend?
Answer: There are two alternative procedures:

(1) If the Executive were to execute the provisions in question, any party injured by the execution would have standing to seek judicial review. The Executive would still have the privilege of refusing to defend the validity of the provisions he has executed, in which event the House and Senate would doubtless intervene or be invited to provide the necessary defense. That was precisely the procedure followed in the Chadha one-House veto litigation, where the Executive respected and executed the veto procedures and then declined to defend those procedures when the injured party sought judicial review.

(2) If the Executive declines to obey or respect the provisions, as has happened in this instance, then a party (such as the protesting bidder) who is injured by the failure to execute the GAO bid protest procedures would have standing to institute judicial review proceedings. Such is the procedure leading to the proceedings in Lear Siegler Inc. v. John Lehman, Secretary of the Navy, et al., Case No. 85-1125 (D.C.Cen.Dist. Cal.). There an unsuccessful bidder on a Navy procurement of aircraft fuel tanks desired to file a protest with the GAO, but was advised that the Navy intended to disobey the CICA provisions and proceed with the award and authorization of performance. Lear Siegler thereupon filed suit, seeking to enjoin the Navy's refusal to follow the CICA bid protest system and asserting that the CICA provisions are presumptively valid and enforceable. Thus is brought into focus not only the validity of the CICA provisions but also the propriety of the Government's disobedience of the law -- an embarrassing and unfortunate issue to put to a court.

As to whether the likelihood of obtaining a prompt determination of the Act is enhanced, lessened or unaffected by the Executive's decision to refuse to implement these provisions, which is part of Rep. Horton's first question,

I would say the decision probably has little if any effect on the likelihood of a prompt determination. Had the Executive obeyed CICA, a successful bidder injured by the delay caused by the GAO bid protest procedures would likely have filed as prompt a judicial protest as did Lear Siegler.

Rep. Horton's Question 2: Is there a basis in the decisions of the Supreme Court for not according a presumption of validity to the challenged provisions of CICA? Answer: No. It is well established that Congressional statutes that adjust the burdens and benefits of economic life, which is of the essence of CICA bid procedures, "come to the Court with a presumption of constitutionality." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). Moreover, to the extent that the CICA procedures may be said to implicate separation of powers problems, as the Attorney General suggests, INS v. Chadha holds that the presumption of constitutionality still applies. In the Court's words: "When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it. . . . When the Executive acts, it presumptively acts in an executive or administrative capacity as defined in Art. II. And when, as here, one House purports to act, it is presumptively acting within its assigned sphere." 103 S.Ct. at 2784.

Rep. Horton's Question 3: Which is the key issue in determining whether this Act violates the separation of powers doctrine: the organizational status of the General Accounting Office, the appointive process for the Comptroller General, or the nature of the functions to be performed by the Comptroller General under the Act? Answer: Essentially, as I have explained in Part I of this document, the separation of powers problem in this instance turns upon the delegated nature of the functions performed by the Comptroller General. Where the GAO appears on the organizational charts is not important, for "quasi" functions can be delegated to any executive or legislative agency. The fact that the Comptroller is appointed by the President, with the advice and consent of the Senate, only serves to remove any Buckley v. Valeo problem as to Congress invading the President's appointment function.

The Attorney General also points out that, although the President appoints the Comptroller, he "has no statutory right to remove the Comptroller General, even for cause." Section 703(e)(1) of Title 31, U.S.C., provides that the Comptroller may be removed at any time by (a) impeachment, or (b) by joint resolution of Congress (which must be presented to the President for approval or veto) on grounds of permanent disability, inefficiency, neglect of duty, malfeasance, or commission of a felony or conduct involving moral turpitude. Thus the President participates in the removal process only to the extent of approving or vetoing a joint resolution of removal for these stated grounds; a veto of such a resolution could of course be overridden by two-thirds vote of both Houses. The President has no other explicit or implicit authority to remove the Comptroller.

Such a limited role of the President in the removal process fully complies with the Constitution. In Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935), the Supreme Court made it clear that under the Constitution "illimitable power of removal is not possessed by the President" with respect to officers of "quasi-legislative or quasi-judicial agencies" established by

Congress. Humphrey's Executor held, of course, that the Federal Trade Commission is such a "quasi-function" agency and that a member of that Commission, even though appointed by the President, can be removed only for the reasons specified by Congress. In the Court's view, to permit the President "illimitable" power to remove a member of an agency designed to be independent of Executive control, without regard to the statutory conditions of removal, would constitute an Executive violation of the separation of powers doctrine. 295 U.S. at 629-30. The same analysis must be applied here. The Comptroller General heads the GAO, an agency similar to the FTC in its freedom from Executive domination; and the GAO has been delegated certain "quasi" functions similar to those delegated to the FTC. It follows that Congress may properly establish the terms of removal of the Comptroller General. The Attorney General's claim that failure to give the President exclusive power to remove the Comptroller General violates the separation of powers doctrine is without merit.

I must add that the fact that the President plays no role in removing the Comptroller, other than by participating in the process of removal by joint resolution, does not call into question the Comptroller's status as an "Officer of the United States." The Supreme Court has already determined that the Comptroller achieves that status by virtue of his appointment by the President, pursuant to the Executive power to appoint "Officers of the United States" (Article II, Section 2). Buckley v. Valeo, 424 U.S. at 128 n. 165. In other words, the status of "Officers of the United States" is determined by the nature of the initial appointment, not by the nature or terms of a removal from office.

Rep. Horton's Question 4: Do you agree with the 1980 statement of then-Attorney General Benjamin Civiletti that Myers v. United States, 272 U.S. 52 (1926), "holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts; . . . [i]f the statute is unconstitutional, it is unconstitutional from the start"? Answer: I do not read Myers as making any such ruling, even by way of dictum. The statement ascribed to Mr. Civiletti is reminiscent of an overstatement uttered by the Supreme Court long ago in Norton v. Shelby County, 118 U.S. 425, 442 (1886), to the effect that "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is [as] inoperative as though it had never been passed." But as Chief Justice Hughes later remarked in Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374 (1940), such a broad statement "must be taken with qualifications. The actual existence of a statute, prior to such a [judicial] determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored."

I suggest that one of the consequences flowing from the "operative fact" of the initial enactment of a statute, assuming full conformity with the bicameral-presentment processes, is that the Executive's Article II

obligation to enforce and execute that statute attaches at the moment the President signs the bill into law, or at the moment a Presidential veto is overridden. That obligation, as I have repeatedly said, is not removed by any Executive judgment, entertained at the moment the bill becomes law, that the statute is unconstitutional, or that a court is likely to invalidate it. If I am correct in that belief, how can a subsequent judicial invalidation of the statute retroactively free the Executive from his constitutional obligation to execute the law? Or suppose a court later finds the statute to be constitutional, contrary to the President's asserted belief? If the President has knowingly failed to execute the statute during the interim between enactment and judicial validation, has not the Executive violated his sworn duty "faithfully" to execute the law during the interim period? The simple fact is that, under any circumstance, this duty to execute cannot be made to turn on the ultimate correctness of a belief that the statute is invalid. Or, as said by the Court in Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838), "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution [for whatever reason], is a novel construction of the constitution, and entirely inadmissible."

Rep. Horton's Question 5: "Civiletti went on to say in that letter, however, if I may paraphrase his statement, that if the President defies an Act of Congress, his action will be condemned if the Act is ultimately upheld. His own views regarding the legality or desirability of the statute do not suspend its operation and do not immunize his conduct from judicial control. He may not lawfully defy an Act of Congress if the Act is constitutional. This was the teaching of the near sequel of Myers, Humphrey's Executor v. United States. . . . In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot. Do you agree with this statement by Attorney General Civiletti?" Answer: I do agree.

Mr. Civiletti's statement is to be contrasted with the position more recently expressed by Attorney General William French Smith, in his February 25, 1985, letter to the Chairman of the House Judiciary Committee. Mr. Smith states the Department's present position by quoting from an extra-judicial letter written by Chief Justice Chase during the Johnson impeachment trial. The Chief Justice there wrote that the President has no duty to execute a statute that "directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals. . . . How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to have passed in violation of it?" R. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase 685 (1874)(emphasis in original).

Moreover, in identical letters to the President of the Senate and the Speaker of the House, both dated November 21, 1984, Mr. Smith reiterated what

he described as the historic and pre-existing position of the Department of Justice in these terms:

The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.

Mr. Smith's November 21 letter then asserts that the challenged CICA provisions "fall within both of those categories," that is, the provisions tread upon Executive power and Chadha is the "prior precedent [that] overwhelmingly indicates that the [CICA provisions are] invalid."

At this point, I will add only two thoughts with respect to the Department's stated policies: (1) they are quite inconsistent with the President's Article II duty to "take care" that these CICA provisions be "faithfully" executed, at least until the Judicial Branch declares them invalid; and (2) since the Attorney General "is the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed," Ponzi v. Fessenden, 258 U.S. 254, 262 (1922)(per Taft, C.J.), the Department exceeds its legitimate function in advising the President and all federal agencies and departments to be "unfaithful" to the execution of the CICA provisions. It is one thing for the Department to refuse to defend those provisions in court proceedings. It is quite another to advise the entire Executive Branch to refuse to execute designated statutory functions.

Rep. Horton's Question 6: In footnote 13 of the Chadha opinion [103 S.Ct. at 2779], the Supreme Court stated that "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds," a statement that follows an assertion [in the same footnote] that the "assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review." Do you believe that a President, when presented with a bill which contains provisions he believes to be unconstitutional, has an obligation to veto the bill?

Answer: In the absence of line veto authority, the President has no "obligation" to veto an entire bill because certain sections are thought to be invalid. Whether to veto or not is a discretionary and perhaps a political judgment for the President to make. There are no general principles to guide the President in such a situation. He may feel that the overall thrust of the bill is so salutary as to outweigh the questionable sections; or he may feel quite the contrary. But the important point is that the President, once he decides to sign the measure into law, is bound by Article II to faithfully execute the entire Act, including the sections that he thinks are invalid.

Rep. Horton's Question 7: In the past, GAO performed its bid protest function based on its statutory authority to settle government accounts: (A) Are those two functions analogous, that is, can you say that the bid protest function as it is now established in CICA is any more intrusive on the functioning of the Executive Branch than the settlement of accounts function? (B) Does the authority granted to the Comptroller General in CICA to award costs and attorney fees present a question which is any more troubling than the stay provision in terms of its intrusiveness on the functions of the Executive?

Answer: As to (A), the bid protest function of the GAO is no more intrusive than its settlement of accounts function. These are simply alternative forms of delegated authority to the GAO to inquire into and oversee the exercise of government procurement policies and the expenditure of procurement appropriations, to the end of advising the Congress as to whether new legislation is needed. It is certainly not the constitutional function of the Executive to engage in any procurement practice or expenditure other than in strict accordance with the direction of Congress — which in this instance means in accordance with the challenged CICA provisions. As to (B), the CICA provision for awarding costs and attorney fees is no more "troubling" than the stay provision. Again, the Executive Branch has no vested authority to award such costs and fees, except when specifically authorized by Congress. And if Congress deems it "necessary and proper" to delegate this function to the GAO, rather than to the Executive or Judicial Branches, the separation of powers doctrine is in no way violated. Were it otherwise, much of the delegation theory that underlies modern administrative law would be in jeopardy. See, e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

Rep. Horton's Question 8: Is the reference to the Comptroller General by the Supreme Court in Buckley v. Valeo [424 U.S. at 128 n. 165] of any value in resolving the issue? The Court said there that the Federal Election Commission's attempt to analogize its members to the Comptroller General failed because the Comptroller General, unlike the original members of the FEC, is appointed by the President. Answer: That reference is of some value, as I explain in answer to Rep. Horton's Question 3, above. Buckley basically held that FEC members, particularly those appointed by Congress, could not constitutionally perform executive functions since they had not been appointed by the President and thus could not be considered "Officers of the United States." Since the Comptroller General is appointed by the President, he is constitutionally capable of receiving and exercising delegated quasi-functions of a legislative, executive or judicial nature.

Rep. Horton's Question 9: Would you explain the significance, if any, of the fact that the GAO, according to its enabling statute is an instrumentality "independent of the executive departments" [31 U.S.C. §702(a)], rather than independent of the Executive Branch? Is the GAO subject to direction by OMB? Answer: As I explain in paragraph (4) of Part I of this document, the GAO and the Comptroller General have dual roles to play, confusing those who compose neat governmental organization charts. Primarily, the GAO is an independent agency established by Congress to aid it in its power of inquiry, with additional quasi-executive and quasi-judicial functions having been delegated to it. Hence I would say it is designed to be independent of both the Executive departments and the Executive Branch, although I doubt if there is much of a distinction to be made between "departments" and "Branch." It would follow that GAO is not subject to direction by OMB, which I assume is an Executive agency.

Rep. Horton's Question 10: Are there any Officers of the United States who are not removable by the President? Answer: Yes. Members of most independent agencies, appointed by the President, can be removed only in accordance with removal guidelines established by Congress. As the Humphrey's Executor case held, the President has no "illimitable" power to remove such Officers of the United States. Professor Corwin has noted that "the President's constitutionally illimitable power of removal reaches only two classes of officials: (1) those whose statutory powers are ministerial merely; (2) those who exercise the President's own powers, whether of statutory or constitutional origin." E. Corwin, The President: Office and Powers, 1787-1984, 107 (5th rev. ed., 1984).

Rep. Horton's Question 11: Would you explain the basis for the presumption of constitutionality afforded Acts of Congress by the courts, and the circumstances in which the Supreme Court has found it inapplicable when reviewing Acts of Congress? Answer: First, see my answer to Rep. Horton's Question 2, above. Second, as I understand it, this presumption is based upon the following factors: (a) the high respect which the Judicial Branch holds for the actions and views of its coordinate branch, the Legislature; (b) the separation of powers doctrine, which means that courts will not lightly tread upon legislative judgments made by the Congress; (c) the notion that Congress would not knowingly enact an unconstitutional statute, inasmuch as every legislator is presumed to know and act within the law; and (d) the judicial doctrine that a statute should be invalidated only as a measure of last resort, after all efforts to construe the statute consistently with the Constitution have failed. The latter factor, of course, reflects the Supreme Court's long-held view that to declare an Act of Congress unconstitutional on any ground is "the gravest and most delicate duty that this Court is called upon to perform." Blodgett v. Holden, 275 U.S. 142, 148 (1927)(per Holmes, J.).

While the presumption of constitutionality is a strong one, it is not conclusive or irrebuttable. And, as stated in the famous footnote 4 of United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the

Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." Suffice it to say that the challenged CICA provisions do not on their face contradict any specific provision of the Constitution; and the separation of powers doctrine, which allegedly invalidates these provisions, is just a doctrine and not a specific constitutional provision. Thus the rebuttable presumption of constitutionality attaches to the CICA provisions. See, generally, O. Field, The Effect of an Unconstitutional Statute 4-5 (1935).

Rep. Horton's Question 12: "I understand that the FAR regulations [Federal Acquisition Regulations] provide for a stay of contract award or performance of a protested procurement similar to the stay mandated by CICA. (1) Would the possibility of obtaining a judicial determination of the constitutionality of the CICA stay provision be reduced by agency compliance with the FAR stay? (2) Doesn't the Justice Department's argument in accepting the FAR stay, but not the CICA stay, amount to this: a stay legislated by the Executive Branch is constitutional but a stay legislated by the Legislative Branch isn't?"

Answer: I must assume that a FAR stay is one voluntarily agreed to by the agency. The OMB's directive of December 17, 1984, in advising agencies to disregard the CICA stay provisions, states that pursuant to the FAR provisions "the agency may voluntarily agree to stay procurements pending the resolution of bid protests, but the grant of such a stay must be based upon other valid authority and may not be based upon the invalid stay provisions of [CICA]."

In answer to part (1) of this question, I would suppose that an agency's voluntary agreement to a FAR stay would deprive the successful bidder of any injury stemming from a CICA stay, and thus drain him of any standing to secure a judicial resolution of the CICA constitutional problem. As to part (2) of this question, I would agree that the Executive is trying to argue that the Executive Branch can authorize a stay, but the Legislative Branch cannot. This bifurcated argument illustrates the Executive's confusion and misunderstanding of the constitutional power of Congress either (a) to provide by statute for a stay under stated conditions, or (b) to authorize by statute that an agency or officer may order a stay or voluntarily enter into a stay arrangement. FAR regulations doubtless owe their existence to some statutory authorization; in no event do they represent the exercise of any vested constitutional power of the Executive.

Rep. Horton's Question 13: Assuming that there are certain circumstances which would justify a Presidential assent to legislation containing unconstitutional provisions, does the President's obligation under the Constitution to "take Care that the Laws be faithfully executed" require him to implement the law notwithstanding his belief that it is unconstitutional?

Answer: Yes. The "take care" clause has no exceptions. As commentators have said many times, despite a Presidential belief that a duly enacted statute invades Executive powers, he must comply with and execute that statute until it is definitively invalidated by the courts, although he is entitled to take appropriate steps -- other than by inaction or refusal to execute -- to have the law tested. See, e.g., Winterton, The Concept of

Extra-Constitutional Executive Power in Domestic Affairs, 7 Hastings
 Const.L.Q. 1, 35 n. 237 (Fall 1979).

This Question 13 further asks whether there is any viability to the statement in Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838), that it would be a novel and "entirely inadmissible" construction of the Constitution to contend that the President's obligation to see the laws faithfully executed implies a power to forbid their execution. In my view, the Kendall pronouncement is entirely viable today. It has never been repudiated or questioned by the Supreme Court. It remains the most pertinent remark ever made by the Court on this vital constitutional matter. Finally, this Question 13 also asks by what authority and under what circumstances, if any, a President may forbid implementation of legislation, passed by Congress and signed into law by that President. My answer is that I know of no such constitutional authority, nor of any circumstances justifying such action. That is precisely what has happened in the CICA situation. It is a blatant violation of the Presidential "take care" obligation; as such it could be considered an impeachable offense by the responsible officials.

Rep. Horton's Question 14: "Does it make any difference in your answer [to the last part of Question 13] whether the Act of Congress in question was signed into law by the President refusing to implement it; that is, would a successor have any greater authority to refuse to implement or defend an Act of Congress than the President who signed the measure into law?" Answer: No. The President's "take care" obligation applies equally to statutes signed into law by that President or by a predecessor. There is no language in Article II that permits such a distinction.

Rep. Horton's Question 15: Congress first enacted in 1978 [Pub.L. 96-132, §21, 93 Stat. 1049 (1978)], a provision requiring the Attorney General to notify each House of Congress as to any case in which the Attorney General (1) establishes a policy to refrain from the enforcement of any law enacted by Congress, providing for enforcement by the Department of Justice, that the Attorney General believes to be unconstitutional, or (2) determines that the Department of Justice will contest, or will refrain from defending, in any administrative or court proceeding, any provision of law enacted by Congress because of a departmental position that such law is unconstitutional. Can that provision be construed to infer authority in the President to refrain from defending or enforcing provisions of law enacted by the Congress?

Answer: The problem addressed by this provision is a most profound one, deserving of full attention by the Congress. My immediate answer, however, is that no statutory reporting requirement like this one can possibly confer authority on the President to violate his constitutional "take care" obligation, an obligation to which the Attorney General is equally bound. The sense of that reporting requirement has certainly been satisfied in this instance; Congress has been fully advised of the position of the Department of Justice and its intent to contest the validity of the CICA provisions. But the mere fact that such a report has been made, supplemented in this instance by the OMB directive to the entire Executive Branch to disregard the law, serves only to define and emphasize the gravity of the constitutional problems

created by the Executive defiance of the law. Notification to Congress of the Executive position cannot serve as Congressional approval of the patent violation of the "take care" obligation, or as an authorization for continuing the violation.

The intent of the Attorney General to contest, or not defend, the challenged CICA provisions presents a secondary issue that I have not here addressed. But even assuming that such a position is consistent with the constitutional and statutory duties of the Department of Justice, the announced intention and directive to ignore and decline to execute those provisions create a separation of powers crisis of the first magnitude. And the suggestion of the Department that its position will enhance the likelihood of a quick judicial resolution of the constitutional challenge thrown down by the Department belies an appreciation of the true role of the Executive in enforcing the laws of the land. The erroneousness of the position advanced by the Department has been best expressed some time ago in 3 Willoughby, The Constitutional Law of the United States 1503-04 (2d ed. 1929):

In the first place, the President does not stand upon the same footing as regards the Constitution, as does the private citizen. The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he refuse to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. . . . It is the duty or privilege of a private citizen to refuse obedience to a law, if, upon careful consideration and investigation, he considers it to be unconstitutional, but he does so at his own risk, and if he is wrong he must abide by the legal consequences. Then, too, only his particular interest is directly involved. If, however, it be said that the President also refuses his obedience at his own risk, namely the danger of impeachment and possible subsequent civil or criminal prosecution, the reply is that, in the first place, a refusal on his part to execute the law nullifies it in all its applications for all people; and in the second place, that impeachment is not a check. As an instrument for checking unconstitutional action on the part of the President, impeachment has been found too cumbersome [and] not [to] be greatly feared.

Respectfully submitted,

Eugene Gressman
Eugene Gressman

Professor of Constitutional Law
School of Law, University of
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Chapel Hill, N. C. 27514

Mr. BROOKS. We want to thank you gentlemen for coming down and for making a substantial contribution to this hearing. That is what it is all about. We appreciate it, thank you.

The committee will recess until we go vote. When we return, we will hear from the Honorable Karen Hastie Williams. Thank you.
[Recess taken.]

Mr. BROOKS. Our next witness is Karen Hastie Williams, chairman of the Legislative Liaison Committee, public contract law section of the American Bar Association.

She is also a partner with Crowell & Moring here in Washington, and the former Administrator of the Office of Federal Procurement Policy, Office of Management and Budget.

Ms. Williams is appearing with George M. Coburn, who is with Sachs, Greenebaum & Tayler. He is a former chairman of the public contract law section of the ABA. Mr. Coburn was originally scheduled to appear as a separate witness, but in the interest of time, I asked both Ms. Williams and Mr. Coburn to appear together. It is my pleasure to have you with us. Your prepared statements which are excellent will be made a part of the record. The other material that you have attached to your statement, Ms. Williams, will also be made a part of the record. I would appreciate your comments at this time.

We will start with you, Ms. Williams.

STATEMENT OF KAREN HASTIE WILLIAMS, CHAIRMAN, LEGISLATIVE LIAISON COMMITTEE, SECTION OF PUBLIC CONTRACT LAW, AMERICAN BAR ASSOCIATION

Ms. WILLIAMS. Thank you, Mr. Chairman. It is a pleasure to appear before the committee this morning representing the American Bar Association and to provide this committee with our views on the constitutionality of the Competition in Contracting Act as it applies to the bid protest procedures of the General Accounting Office.

The American Bar Association has testified several times in recent years on the need for codifying in statute the authority of the GAO in the bid protest arena.

The prior statements that I have attached to my prepared remarks indicate that the ABA believes that it is constitutional for the GAO to exercise its bid protest authority.

I will summarize our position, Mr. Chairman, in the interest of time and then respond to any questions you may have. The Comptroller General has summarized the position of the Justice Department so I will not belabor that point.

For us the beginning and the end of the discussion with respect to the constitutionality of the provisions of the CICA focus on the authority of the Comptroller General as he acts in the bid protest arena.

Is the administration correct to say that he is purely a legislative officer?

We believe the answer is clearly no. The popular perception of the GAO as an arm of the Congress does not answer the legal, constitutional question that you and Mr. Horton addressed earlier.

The place of the GAO, within the Federal hierarchy of the three branches, the appointive process for the Comptroller and the nature of the functions that he performs in deciding bid protests to our mind are far more important indicia, indicia which point to the conclusion that this new statute will pass constitutional muster.

As the chairman has noted, it is the courts, and only the courts, in our democratic system that are the final arbiters of the issue of constitutionality.

I will highlight for you, however, the elements that we believe support the constitutionality of the CICA.

First, the GAO's enabling statute states that the Comptroller is independent of the executive departments and not dependent on the executive branch. Congress clearly did not want a Comptroller General who was under the thumb of the executive departments to then audit their accounts.

The Comptroller General was charged with the responsibility of overseeing Federal expenditures and reporting to the Congress as well as to the executive branch on these issues.

Next, the appointive process for the Comptroller and for his deputy also belie the characterization of the Justice Department that he is purely a legislative officer. He is appointed by the President with the advice and consent of the Senate, just like the other officers of the United States.

Indeed, the Supreme Court has specifically distinguished the Comptroller General from the Federal Election Commission appointments and other appointments that it finds violative of the separation of powers doctrine.

The statutory provisions on removal of the Comptroller do not transform him into a legislative officer. The law establishes a role for the Congress to play in the removal process, but does not purport to exclude the President from this removal process.

Third, I would note that the executive status assumed by the Comptroller in performing certain public accounting functions has long been recognized. For over 60 years, the Comptroller has served an important role in the bid protest arena, derived from his statutory authority to settle public accounts. This function was lodged initially in the Department of the Treasury, but was transferred to the Comptroller by the President in the Budget and Accounting Act of 1921, an act with which this committee is intimately familiar.

The courts have recognized that the Comptroller's action in the bid protest arena is a form of prospective approval or disapproval of certain payments by Government departments or other agencies.

To me, Mr. Chairman, these indicia point to the inevitable conclusion that the Comptroller General, when acting on bid protests, is an officer of the United States and is performing an executive function.

Accordingly, there can be no breach under those circumstances of the doctrine of separation of powers. I would be glad, Mr. Chairman, to entertain any questions that the committee may have after Mr. Coburn makes his statement.

I would say that Mr. Coburn has provided yeoman service to the public contract law section, but, as you noted, he is appearing

today as a private practitioner in the area of Government contracts with which he has long been acquainted.

[Ms. Williams' prepared statement follows:]

STATEMENT OF
KAREN HASTIE WILLIAMS
on behalf of the
AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

My name is Karen Hastie Williams. I am Chairman of the Legislative Liaison Committee of the Public Contract Law Section of the American Bar Association (ABA).

I appear before you today, as the representative of John Shepherd, President of the ABA, to express the ABA's views on the constitutionality of the Competition in Contracting Act ("CICA")^{1/} which authorizes specific actions by the General Accounting Office to enforce its jurisdiction over the area of bid protests. We commend you and your subcommittee for holding oversight hearings on this important procurement reform legislation to monitor its effective implementation within the Executive Branch.

In July, 1984, the American Bar Association issued the following statement:

"The American Bar Association has long supported providing a general basis for the General Accounting Office bid protest functions. The question of the constitutionality of these procedures was raised in conjunction with the consideration of similar legislation in 1977. At that time the ABA concluded that this procedure is 'entirely within the legislative power of Congress to enact.' We believe that the bid protest procedures contained in title 7 of the Deficit Reduction Act signed by the President . . . are constitutionally sound."

For the information of the subcommittee I have attached to my prepared Statement copies of earlier ABA testimony on this subject. (See Attachment 1).

^{1/} Public Law 98-369, 98 Stat. 494 (1984) (31 U.S.C. §§ 3551-3556.

Constitutionality of the GAO Bid Protest Procedures

A. Introduction

Despite the best efforts of the Congress, government procurement law remains a mixture of technical regulations and procedures which defy simple explanation to the layman and indeed to most lawyers. It is rare, therefore, that procurement law issues rise to constitutional proportions. In the case of the Competition in Contracting Act, however, the Department of Justice ("DOJ") and the President, have asserted that the GAO bid protest procedures in the Competition in Contracting Act provide an unconstitutional delegation of executive power to an officer of an agency of the Legislative Branch, *i.e.*, the Comptroller General and the GAO. A brief summary of the GAO bid protest provisions is a useful starting point for analyzing their constitutionality.

B. Summary of GAO Bid Protest Provisions

The CICA bid protest provisions serve two purposes. First, they codify the GAO's long-standing role as a forum in which bid protests may be brought. Second, the bid protest provisions strengthen substantially the powers that the GAO has exercised over bid protests.

Prior to enactment of the CICA, agencies could award a contract notwithstanding a protest if it was found to be "advantageous to the Government" to do so. Federal Acquisition Regulation ¶ 14.407-(a)(b)(4)(iii) (1984) ("FAR"). Agencies were encouraged to suspend performance if the contract had already been awarded. FAR ¶ 14.407(a)(c). Under the new CICA legislation, however,

award may not be made after a GAO protest is brought unless the head of the procuring agency finds that "urgent and compelling circumstances which significantly affect the interest of the United States will not permit waiting for [the Comptroller General's decision]." CICA § 2741(a) (31 U.S.C. § 3553(c)(2)).

If a protest is brought within ten days of award, performance is to be suspended unless "performance of a contract is in the best interest of the United States." CICA § 2741(a) (31 U.S.C. § 3553(d)(2)). If performance is allowed to continue, the Comptroller General is to rule on the merits of the proposal and "recommend" appropriate relief without regard to cost or disruption from terminating the contract. CICA § 2741(a) (31 U.S.C. § 3554(b)(2)). The Comptroller General's decision is to be issued within 90 working days from the date the protest was submitted, unless he states in writing the reasons of the specific circumstances of the protest require a longer period. CICA § 2741(a) (31 U.S.C. § 3554(a)). An accelerated procedure is also established in the legislation for resolving "suitable" protests within 45 days. Id.

In other words, if the CICA provisions are strictly enforced, contractors now should automatically be granted the equivalent of a preliminary injunction upon filing a pre-award protest, with a heavy burden on the government for the injunction to be lifted.

The bid protest provisions were originally contained in H.R. 5184, sponsored by Representatives Jack Brooks and Frank Horton, the Chairman and Ranking Minority Member, respectively, of both

the House Government Operations Committee and its Legislation and National Security Subcommittee.

The bill was reported from subcommittee but was never acted on by the full House. It was discussed and included, however, as a subtitle of the Deficit Reduction Act of 1984, when S.338, the Senate companion bill to H.R. 5184, was added by Senator Cohen to the tax bill and sent to conference with the House.

Representative Brooks was appointed to the Conference Committee and succeeded in having the bid protest provisions from H.R. 5184 added to the deficit reduction legislation.

The Administration Position on Unconstitutionality of the GAO Provisions

The Department of Justice early expressed its concerns about the constitutionality of the H.R. 5184 bid protest provisions.^{2/} At the time, H.R. 5184 had been reported out of Rep. Brooks' subcommittee and was awaiting action by the full committee. 41 FCR 679, 866. Because the final version of the bid protest procedures enacted in the CICA differ somewhat from those of H.R. 5184, some of the DOJ objections were alleviated; however, several H.R. 5184 provisions that caused concern to the DOJ are contained in the CICA and fuel the Administration's constitutional challenge.^{1/}

^{2/} See letter of April 20, 1984 from Assistant Attorney General Robert A. McConnell to Rep. Brooks. ("McConnell Letter") (Attachment 2). 42 FCR 122-24.

^{1/} See letter of November 21, 1984 to Honorable George Bush from Attorney General William French Smith ("Smith Letter") (Attachment 3).

The Department raised two principal objections of continuing relevance, after stating its initial conclusion that the Comptroller General is an officer of the Congress.^{4/}

First, Justice asserted that the bid protest provisions would grant to the GAO, a legislative body, the power to delay permanently some agency contracts and thus, analytically, create a situation similar to the "committee approval" or "legislative veto" process struck down in INS v. Chadha.^{5/} The DOJ reasoning on the application of Chadha has been rather cryptic and confusing. The DOJ suggested that the "legislative veto" problem could arise if the Comptroller General used his authority under H.R. 5184, § 204(c) (now CICA § 2741(a) (31 U.S.C. § 3554)) to justify a time extension beyond the 90-day statutory period and continued to do so indefinitely.

A second tenet of this argument was that the bid protest provision violated Chadha, because, unlike a constitutionally-permissible requirement to report an agency action to Congress and delay the action for a statutorily predetermined period of time ("report and wait"),^{6/} the CICA would permit the GAO to render decisions before the 45- or 90-day statutory limit contained in the CICA provision and thereby shorten the statutory waiting period. Vesting such discretion in the GAO to affect agency

^{4/} McConnell Letter, supra, at 1; Smith Letter, supra, at 2-3.

^{5/} 462 U.S. 919 (1983) ("Chadha").

^{6/} Sibbach v. Wilson, 312 U.S. 1 (1941): Chadha, 462 U.S. at 941 n.9 (citing Sibbach v. Wilson).

procurements (even though such action would only lie "recommendations" and would presumably be welcomed by the Executive Departments) violated Chadha, contended the DOJ.

A third tenet of this argument was the position that the bid protest procedures also differ from a "report and wait" process because there was no direct relationship between the GAO bid protest review and the legislative process.

Second, the Justice Department argued that the purported grant of authority to the Comptroller General to award protest costs, including attorneys fees (and presumably the bid and proposal costs provision added to the CICA later in legislative process), which awards "shall be paid promptly" by the agency, CICA § 2741(a) (31 U.S.C. § 3554(c)), was an unconstitutional grant of either executive or judicial authority to a legislative body, citing Buckley v. Valeo.^{1/}

ABA Position on Constitutionality

The Administration's objections rest largely on the conclusion that the Comptroller General is exclusively "an officer of the Legislative Branch", heading an agency that is "independent of the executive branch."^{2/} As such, the Comptroller General cannot "exercise executive or judicial authority without violating the doctrine of separation of powers."^{3/}

^{1/} 424 U.S. 1 (1976).

^{2/} McConnell Letter at 1.

^{3/} Id.

In this regard, the Administration points, in particular, to the Comptroller's statutory authority to dismiss frivolous protests, which dismissal operates to lift the statutory-imposed stay on contract awards or (in certain instances) performance.^{10/} Exercise of such authority by a "legislative officer," the Administration asserts, violates the separation of powers principles regarding legislative vetos established in Chadha, supra.^{11/}

For the ABA, the starting (and ending) point of the relevant inquiry is the status of the Comptroller when he acts on bid protests. Is the Administration correct to say that he is purely a "legislative officer?" We believe that the answer is clearly "No." The popular perception of the GAO as an "arm of Congress" does not answer the constitutional question. The place of the GAO in the federal hierarchy, the appointive process for the Comptroller, and the nature of the functions he performs in deciding bid protests are far more important indicia -- indicia which point to the conclusion that the new statute should pass constitutional muster. While the courts must be the final arbiter of this issue, I would now like to highlight each of the elements that I have just mentioned in support of our position.

^{10/} Smith Letter, supra, at 6-7. The Comptroller General's limited authority to extend the 90-day decision period is put in the same category.

^{11/} 462 U.S. at 939.

First, the GAO's enabling statute states that the Comptroller is independent of the "executive departments," not independent of the "[E]xecutive [B]ranch."^{12/} Congress clearly did not want a Comptroller General who was under the thumb of the very executive departments whose operations he was charged to audit. At the same time, however, the law does not make the Comptroller totally independent of each and every element of the Executive Branch. For example, the Comptroller must respond directly to the President when the Chief Executive requests information on the work of the GAO or on expenditures and accounting.^{13/}

Second, the appointive process for the Comptroller (and his Deputy) belies his characterization as a purely "legislative officer." He is appointed by the President, with the advice and consent of the Senate, just like other "Officers of the United States."^{14/} Indeed, the Supreme Court, in Buckley v. Valeo,^{15/} specifically distinguished the Comptroller from Federal Election Commission appointments that it found violative of the separation of powers doctrine. The statutory provisions on removal of the Comptroller do not transform him into a "legislative officer." The law establishes a role for the Congress in the removal process but does not purport to exclude the President from his traditional role. Some have seriously questioned the constitutional validity

^{12/} 31 U.S.C. 702(a).

^{13/} 31 U.S.C. 719(a), (f).

^{14/} 31 U.S.C. 703(a)(1).

^{15/} 424 U.S. at 128 n.165.

if Congress sought to claim exclusive removal power over the Comptroller -- or any other "Officer of the United States."^{16/}

Third, the executive status assumed by the Comptroller in performing certain public accounting functions has long been recognized. The Comptroller's bid protest role derives from his statutory authority to settle public accounts -- a function originally performed in the Department of the Treasury itself and delegated by the President to the Comptroller. Indeed, the courts have recognized that the Comptroller's action on a bid protest is a form of prospective "approval or disapproval of payments made by Government departments and other agencies."^{17/} As such, it is "an executive function and in performing it the Comptroller General acts as a member of the Executive Branch of Government."^{18/}

All these indicia point to the conclusion that in acting on bid protests the Comptroller functions as an "Officer of the United States," performing an executive function. As such, there can be no breach of the separation of powers and the line of argument adopted by the Administration becomes inapposite.

Finally, let me add my own personal view on the application of Chadha here. Assume for the sake of this discussion that the

^{16/} See e.g., H. Mansfield, *The Comptroller General -- A Study in the Law and Practice of Financial Administration* 90 (1939); 61 Cong. Rec. 990-992 (1921) (remarks of Congressman Connally).

^{17/} See *United States ex rel. Brookfield Construction Company v. Stewart*, 234 F. Supp. 94, 99, 100 (D.D.C.), aff'd, 229 F.2d 753 (D.C. Cir. 1964).

^{18/} Id.

Comptroller is acting as a legislative officer. The Comptroller's discretion, in effect, to extend any stay period is intended by CICA to be extremely limited. The statute's legislative history makes that clear.^{12/} There is no doubt that Congress itself certainly has the authority to create a "waiting period" in excess of 90 days. Moreover, nothing in Chadha suggests that an action "shortening" such a period is unconstitutional. Finally, the statute gives the executive agency authority to award the challenged contracts (or continue performance) by making certain waiver findings.^{10/} Under these circumstances, even if the Comptroller were acting as a legislative officer, I would conclude that the principles of Chadha are not transgressed.

Conclusion

Review of the judicial and statutory precedents leads us to conclude that the Comptroller General can exercise the bid protest mandate and enforce the statutory authority granted by CICA without violation of the separation of powers doctrine of the Constitution.

Mr. Chairman, I would be happy to respond to any questions from members of the Subcommittee.

^{12/} See H. Rep. No. 861, 98th Cong., 2d Sess. 1436 (1984).

^{10/} 31 U.S.C. 3553(c), (d).



AMERICAN BAR ASSOCIATION

ATTACHMENT 1

STATEMENT OF
O.S. HIESTAND
on behalf of the
AMERICAN BAR ASSOCIATION
before the
SUBCOMMITTEE ON FEDERAL EXPENDITURES,
RESEARCH AND RULES
of the
COMMITTEE ON GOVERNMENTAL AFFAIRS
of the
UNITED STATES SENATE
on the subject of the
FEDERAL PROCUREMENT PROCESS
May 15, 1981

Mr. Chairman and Members of the Subcommittee, my name is O. S. Hiestand and I am the Chairman of the Public Contract Law Section of the American Bar Association. I also am a partner in the law firm of Morgan, Lewis and Bockius.

With me are David L. Hirsch, Chairman-Elect of the Public Contract Law Section, American Bar Association, and Paul G. Dembling, Chairman of the Section's Federal Acquisition Regulation (FAR) Council. Mr. Hirsch is Senior Corporate Counsel, Norris Industries. Mr. Dembling is a partner in the law firm of Schnader, Harrison, Segal and Lewis, and was formerly General Counsel of NASA and GAO, respectively.

We are appearing today on behalf of the American Bar Association, and are pleased to have this opportunity to discuss the Federal procurement process.

The Public Contract Law Section and the ABA have been active for a number of years in regard to needed reforms in Federal procurement. I might add that Mr. Hirsch, Mr. Dembling and I, as well as other members of the Section, were personally involved in the study of Federal procurement conducted by the Commission on Government Procurement (COGP). Mr. Hirsch was a member of one of the Study Groups; Mr. Dembling was a principal advisor to the

Comptroller General of the United States, a member of the Commission; and I was General Counsel to the COGP.

The COGP was established by the Congress in 1969 to study the Federal procurement process and to make recommendations to Congress for improving procurement by the Executive Branch. P.L. 91-129. The statute provided for a bipartisan twelve member Commission which, in addition to the Comptroller General, included members of the House and Senate, officials of the Executive Branch, and public members selected by the Congress and the President. E. Perkins McGuire was chairman of the COGP, and then Congressman Chet Holifield was vice chairman. Senator Lawton Chiles was a member of the COGP. In December 1972 the COGP submitted a four volume report containing 149 recommendations for improving Federal procurement.

The Statutory Framework For Procurement

A basic recommendation of the COGP was the need to reform the statutory framework for Federal procurement.^{*/} That need is as great today as it was in 1972 when the COGP made its report. The existing basic procurement statutes -- Armed Services Procurement Act (ASPA) and Federal Property and Administrative Services Act (FPASA) -- are inconsistent

^{*/} Report of the Commission on Government Procurement (Dec. 1972), Vol. 1, p. 15.

in significant areas and place restraints on the methods of procurement that have adverse effects. Some agencies are either exempt or have authority to exempt themselves from requirements of the FPAS Act. In addition, there are many piecemeal statutes that apply to the procurement process and are scattered throughout the U.S. Code. The COGP study identified some 4,000 statutes relating to procurement by Federal agencies. That was eight years ago. That number is much larger now.

Since the COGP report there have been several bills introduced to establish a single, government-wide procurement statute. The principal bills in the Senate were S. 3005 (1976), S. 1264 (1977), and S. 5 (1979).

After careful study the Public Contract Law Section sponsored a resolution to the ABA House of Delegates in 1976 endorsing the concepts and goals of S. 3005. We sponsored a similar resolution in 1977 on S. 1264. The ABA House of Delegates adopted both resolutions and we testified on S. 1264. I have copies of these resolutions and the ABA testimony on S. 1264, and respectfully request that they be inserted in the record.

Senate bill S. 1264, as well as S. 5, created basic policies and procedures for procurement by all executive agencies, provided guidance on acquisition methods, and

endorsed the issuance of a single set of implementing regulations.

The existing statutes provide that negotiation is an exception to "formal advertising" and do not distinguish between competition and sole source negotiation. As a result, many procurements are classified as negotiated (with a derogatory implication) when in fact they were awarded after very intense competition. The bills referred to above removed the stigma presently attached to the competitive negotiation method of contracting and authorized both competitive sealed bidding and competitive negotiation in accordance with stated criteria. They also established precise criteria for sole source awards.

The competitive negotiation method is a desirable, and even preferable, method of procurement in many cases. It increases the opportunity for businesses to offer different products and services, which provides more opportunity for the government to assess what will adequately fulfill the government's needs. It can provide more assurance that the government and the supplier have a good understanding of what the contractor is to furnish and what the government will pay for.

Some of the criticisms of the competitive negotiation method would be dissipated if a more descriptive label were used. This method of procurement involves the

submission of sealed proposals which the government can accept without any discussion if it so chooses. Normally, however, the government evaluates the proposals; selects those that it considers in a competitive range; has discussions with those proposers; requests "best and final" offers and makes the award on the basis of which proposal is most advantageous to the government, price and other factors considered. If factors other than price are to be considered, they must be identified in the Government's request for proposals.

We believe a better and more accurate label for this method of procurement is the "competitive sealed proposal" method of procurement.

While the Senate bills I have referred to did not provide the total answer to needed reforms, they were a major step in the right direction. We continue to support the concepts of these bills as basic to the reform of the Federal procurement process.

In addition, we recommend that the legislation establishing a statutory framework for procurement should a) apply to nonappropriated fund activities and government corporations, b) cover leasing of and improvements to real property, and c) proscribe auctioneering techniques. The reasons for these recommendations are stated in the attached ABA testimony on S. 1264.

We also suggest that Congress consider including in such legislation policies to be followed in the procurement of major systems. These acquisitions involve very significant utilization of government resources. There has been a continued and growing concern regarding the management of major systems acquisitions despite energetic, conscientious efforts by Federal agencies to improve their procurement procedures.

OMB Circular A-109, which establishes major systems acquisition policies for the Executive Agencies, addresses requirements for stating needs and program objectives in "mission" terms rather than equipment terms; exploration of alternative system design concepts; establishing clear lines of authority, responsibility, and accountability; and for communications with the Congress.

We believe there is room to improve OMB Circular A-109, and also that the fundamental policies for these acquisitions should be embodied in the statutory framework for procurement.

OFFICE OF FEDERAL PROCUREMENT POLICY

The first recommendation of the COGP was for the creation of an office in the Executive Office of the President to serve as a central government policy office for procurement. As you know, the Congress did create the Office of Federal Procurement Policy the (OFPP) in 1974

(P.L. 93-400). The Administrator, a Presidential appointee with the advice and consent of the Senate, was charged with responsibility, among other things, for prescribing policies, regulations, procedures, and forms to be followed by executive agencies in the procurement of goods and services. The Act required the Administrator to keep Congress informed of OFPP's activities, and to notify the Congress in advance of issuing major policies or regulations. The intent was to establish the Administrator as the focal point in the Executive Branch for procurement policy and for coordination with the Congress.

In 1978 OFPP embarked on a project to develop a set of Federal Acquisition Regulations (FAR) which would replace the Defense Department's Defense Acquisition Regulations (DAR) and the General Services Administration Federal Procurement Regulations (FPR), which are applicable to most of the civilian agencies. The FAR, to the extent permissible under existing statutes, would be applicable to all Federal Executive agencies.

The ABA Board of Governors authorized the Public Contract Law Section to provide comments on the proposed FAR. (At the 1981 Mid-year meeting, the ABA Board of Governors extended this special authority through December 1981.)

Over the past two and one-half years the Section has devoted considerable resources to the OFPP FAR project, and, in addition to technical comments, has stressed the need for basic reforms in the Federal procurement process along the lines recommended by COGP and the Senate bills referred to above. We have attempted to provide constructive criticism on the draft FAR because this project is very important to improving the Federal procurement process. We have assembled a set of the Section's responses to OFPP on the draft FAR chapters and subchapters which have been issued for public comment, and would be glad to make it available to the Subcommittee.

In 1979 the Congress amended the OFPP charter (P.L. 96-83) by removing its authority to issue procurement regulations and directing the OFPP to develop a Uniform Procurement System (UPS) and a central management system to implement and enforce the UPS. Pending the enactment of legislation implementing the UPS, OFPP is authorized with the concurrence of the Director of the Office of Management and Budget (OMB), to issue "policy directives," which are mandatory on the executive departments and agencies. The Director of OMB is authorized to rescind agency procurement regulations that are inconsistent with such policy directives. Public law 96-83 also requires that all policy directives proposed by OFPP be submitted in advance to the

Congress, and exempts the procurement of Automatic Data Processing (ADP) equipment and services from OFPP/OMB policy directives.

While the stated purpose of the amendments was to redirect the focus of OFPP's activities, there has been concern that the changes would impair the ability of OFPP to bring into existence a single set of Federal procurement regulations and to exercise the overall direction of procurement policy as originally intended. These concerns were reinforced by the fact that Congress extended the life of OFPP for only three years -- from October 10, 1979.

We strongly supported the establishment of the OFPP, and continue to believe this office is a vital link in improving the Federal procurement process. The need for better control over procurement policies, and a mechanism to advise Congress on procurement legislation, are even more important today than when the COGP made its recommendation to establish an OFPP in 1972.

We hope this Subcommittee will carefully study the proper role and functions of OFPP when legislation on the UPS is being considered.

Uniform Procurement System

As we have noted, the Congress has directed OFPP to develop a Uniform Procurement System and submit legislation later this year to implement it. During October 1980

OFPP submitted an initial proposal for the UPS in accordance with P.L. 96-83.^{*/}

Not surprisingly, there are differences of opinion with regard to that proposal.

The legislation mandating the development of a UPS does not define exactly what is intended. The legislative history merely states that OFPP is to develop "a comprehensive and innovative system that incorporates all elements and stages of the acquisition process." House Report No. 96-178, p. 8.

Some of the criticisms with regard to the UPS have been generated by use of the word "uniform." In this connection, it is interesting to note that the legislative history, while generally referring to a uniform system in describing what OFPP should address, refers to components of a "unified system."^{*/} We believe many of the conceptual difficulties about a UPS would be overcome if the U in UPS meant Unified rather than Uniform.

Such a change in nomenclature should have no substantive effect on what the system consists of, but it would

^{*/} Recently the OFPP announced a plan for developing a new proposal.

^{*/} House Report No. 96-178 states the OFPP should address "the following components of a unified system": Statutes, regulations, work force, and research , p. 9.

be more compatible with the well recognized need to provide flexibility in the implementation and orientation of the system.*/

Procurement is a dynamic process. The kinds of goods and services needed by Federal agencies have changed and will continue to do so. The marketplace and forms of competition for obtaining needed goods and services have changed considerably, and are likely to change in the future. Accordingly, it is counter productive to have detailed statutory prescriptions on how to conduct procurement. As new procurement techniques evolve, the procurement agencies need the flexibility to utilize them in accordance with established criteria. Procurement is not an end in itself, but is a means to enable the agencies to accomplish their functions.

To allow the procurement process to operate efficiently and economically, the statutory base should enunciate only basic policies and requirements which are uniform and applicable across the board. The implementation of these policies and requirements should be controlled through a central organization that is separate from the

*/ Recently the OFPP has suggested it might use the phrase "Federal Procurement System" in lieu of Uniform Procurement System. We think the new phrase is an appropriate title for the procurement system Congress has mandated OFPP to develop.

procurement agencies, but composed of experts in procurement. This is the role for which OFPP was originally created. By enacting a policy-oriented procurement statute and re-establishing OFPP's directive authority to issue regulations, we can have a unified procurement system with flexibility to achieve efficiency and economy in procurement.

Central Management System

P.L. 96-83 also directed OFPP to develop a central management system to implement and enforce the UPS. Again, the legislative history provides little, if any, guidance as to exactly what the Congress intended. The concept of two systems is confusing since the procurement process involves the authorities for and restrictions on procurement, as well as the organizational responsibilities and resources for contracting and for administering contracts. In other words, they are all integral parts of a procurement system.

UPS Components

As noted earlier, the legislative history of P.L. 96-83 identifies four components of the "UPS": statutes, regulations, work force and research. These identified components of the UPS are basically intertwined and need to be dealt with together. However, we are concerned that the

mandate levied on OFPP by P.L. 96-83 disregards the reviews and progress already made in these areas.

There is a need to consider how existing statutes affect the procurement process, and adopt a statutory framework that permits innovation and provides flexibility. The COGP conducted such an examination and made recommendations. We suggest Congress should build on this base and not delay action pending another examination.

A means for controlling regulations and assuring consistency in the application of the statutes among the various contracting agencies is a vital link in the system. The mechanism of achieving this objective now exists in the OFPP.

Well trained and competent people are vital to government procurement. No system will provide efficient and economical procurement without this element. Again, the COGP report identified the shortcomings and made recommendations. Although some progress has been made, the basic problems still exist.

Over the years government procurement has more and more become an adversary relationship. Contracts represent a legal relationship to sell and buy. But they do not have to -- and should not -- create an adversary relationship between the contracting parties. Both parties should be expected to abide by the terms of their contract. However,

it does not serve the public interest to create contract terms and conditions, and contract administration practices, that cause companies to shun government contracts or engage in vexatious litigation. Better training of government procurement personnel and more opportunities for career development can assist in eliminating these problems.

Planned research in connection with the procurement process to identify problems or potential problems and to propose solutions has been sporadic and not very effective. The Federal Acquisition Institute represents a new effort in this direction which should be encouraged.

Training of personnel and research, of course, require money. We suggest the Congress should examine whether the funds available for these situations are adequate to achieve the objectives.

Comments On Selected Substantive Areas

Socioeconomic statutes. The COGP recommended that Congress re-examine the socioeconomic policies that are implemented through the Federal procurement process, and consider other means for accomplishing the basic objective.^{*/} The COGP identified 39 statutes in that category. In the succeeding ten years, the number has continued to grow.

^{*/} COGP Report (1972), Vol. 1, pp. 111-124.

Some of these requirements were established before the development of sophisticated cost principles, improved techniques for analyzing cost and pricing data, and the existence of government audit capabilities. Some were enacted in response to economic conditions that do not now exist. The monetary value for application of some of the statutes is unrealistically low in relation to the change in the value of the dollar from the time they were enacted. This has tended to extend the requirements to many small contracts which were exempt when the requirements were enacted. To avoid this situation in the future, Congress may want to consider a means of "indexing" to maintain applicability at a constant level.

The Congress also should examine how the Department of Labor (DOL) implements the statutes under its jurisdiction that impact procurement -- namely, the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Service Contract Act.

In the past DOL has issued or proposed revisions to regulations implementing these statutes that were questionable as a matter of law, and have imposed or would result in burdensome requirements on the procurement process. In 1976 and 1978 the ABA adopted resolutions urging the Congress to amend the Service Contract Act to correct certain abuses under DOL's actions. Last year the

ABA adopted another resolution opposing a number of revisions to the DOL regulations under these statutes. Copies of these resolutions are attached.

While we recognize these matters are the primary responsibility of another Committee, we are calling them to your attention because of their impact on Federal procurement. One of the problems in assuring that Federal procurement is efficient and economical is the fact that jurisdiction over legislation affecting the procurement process is divided among several Committees of the House and the Senate.

Statute of limitations on claims by the government. We have previously suggested that Congress should adopt a statute of limitations on claims by the government against its contractors. With the passage of Public Law 87-653, "Truth-in-Pricing," and Public Law 93-379, "Cost Accounting Standards", the government can reach back into a completed contract many years after completion of deliveries and file a claim against the contractor. Although the audit clause in government contracts limits the government's right to audit to three years after date of final payment, the audit report setting forth the grounds for a claim might languish for three or four years before a contracting officer issues a final decision which can be appealed. A contractor's ability to submit a claim against

the government under a contract provision, on the other hand, is forever closed once the contractor accepts final payment or, under a cost reimbursement type contract, once a contractor waives its right to such claims against the government.

A statute of limitations on government claims is needed to reduce the significant burden of record keeping and to compel the initiation of government claims while the witnesses are still available and the evidence is reasonably fresh in the minds of the witnesses for both parties.

Unsolicited proposals. The COGP recommended that the government eliminate restraints which discourage the generation and acceptance of innovative ideas through unsolicited proposals. We supported that recommendation and have previously proposed the adoption of legislation that would authorize the use of unsolicited proposals, and permit the award of contracts to those whose proposals are sufficiently unique to justify acceptance by the government. This is particularly true in the high technology arena.

Bid and award protests; rights of judicial review. Title VII of S. 1264 expressly established the General Accounting Office (GAO) as a forum for deciding bid and award protests, and established criteria for the handling of such protests. The ABA endorsed that

proposal. We still believe it is sound, and urge the subcommittee to examine this aspect of Federal procurement.

The Comptroller General and his staff have 55 years of experience in adjudicating bid and award protests. As the Court of Appeals has stated, the GAO has a non partisan, objective view towards the procurement decisions under challenge that could never be achieved by the contracting agencies.

However, the authority for GAO's role is not expressly provided for by statute; it has no power to compel the contracting agencies to respond to a protest; to award bid and proposal costs; or to bind the contracting agencies to comply with its decisions. From time to time, various Attorneys General have raised constitutional questions as to the GAO's authority in this area. In our opinion placing this power in GAO does not contravene the separation of powers doctrine.

In supporting the establishment of GAO in this role, we disagreed with one aspect of Title VII. As drafted, that Title made a GAO decision binding on both the contracting agency and the party filing the protest. The proposed protest procedure contemplated an informal type review although GAO, under criteria set forth in the bill, could conduct a formal hearing, including the issuance of subpoenas. Because there was no guarantee of a trial-type

hearing before GAO, we recommended that GAO decisions be made binding only on the contracting agency, and that other interested persons (e.g., protester, party awarded the contract) have the right to a de novo review in Federal court.

Payment of interest by the government on overdue bills. We also direct your attention to Section 511 of S. 1264 which would have required the government to pay interest on payments due to contractors for more than 30 days.

The government routinely uses a contract provision adding interest on overdue payments owed by a contractor to the government. However, there is no requirement that the government pay interest on delinquent payments to contractors. This can have a serious financial impact on contractors -- particularly small business contractors. Unfortunately, the government sometimes adopts a policy of delaying payments for its own budgetary reasons. In other situations, invoices are not processed promptly because there is no penalty for late payments.^{*/} Whatever the reason,

^{*/} The GSA Board of Contract Appeals recently held the government was liable under the Contract Disputes Act of 1978 (P.L. 95-563) for interest on the late payment of routine vouchers. Capital Security Services, Inc., GSBCA No. 5722, BCA ¶ _____ (____). However, this decision is not binding on other agency BCAs, does not establish a universal rule for the start of interest, and is dependent on the conversion of a voucher to a claim for purposes of the Act. Cf. Alum Contractors, Inc., ASBCA No. 237929, 79-2 BCA ¶ 12199; Robert

(Continued)

failure to pay what is due, on time, adversely affects the contractor involved and creates a bad impression with those who do business with the government.

Multi-year contracts. S. 1264 contained a provision authorizing multi-year contracts (not to exceed five years) for goods and services when appropriations were available and adequate for payment of the first year, and the need for such goods or services was reasonably firm and continuing.

At present only some agencies have such authority. The GAO has consistently held that the multiyear procurement method cannot be used where appropriations are limited to current fiscal year requirements. Although DOD has statutory authority for certain kinds of multi-year contracts, its authority is subject to restraints which reduce its ability to use this method of procurement.^{*/} Multi-year procurement would save the U.S. taxpayers millions of dollars each year.

We supported the multi-year contract provisions of S. 1264, and recommend that the Subcommittee consider the

Builders, Inc., ASBCA No. 24101, 80-1 BCA ¶ 14402. See Spriggs and Churchill "Recovery of Interest Under the Contract Disputes Act for Government Delay in Making Routine Payments," Contract Management, April 1981.

*/ Recently a bill was introduced in the House to permit the DOD to use multi-year procurement contracts under less restrictive conditions.

need for an across-the-board authorization to permit multi-year contracting by all Federal agencies. Multi-year procurement would save the U.S. taxpayers millions of dollars each year. In this connection, the Model Procurement Code for State and Local Governments adopted by the ABA in 1979 includes a provision for multi-year contracts.

Suspension/Debarment. The procedures for disqualifying or excluding persons or firms from government contracts and from federally assisted projects because of alleged fraud or business crimes, violation of various socio-economic laws or policies, or for unsatisfactory performance need to be reviewed. There is a bewildering hodge-podge of inconsistent statutes, regulations and procedures that govern what is generally referred to as "suspension" and "debarment" of government contractors.

A company can be suspended for a "temporary" period pending completion of an investigation and such legal proceedings as may ensue. During the suspension period the company is not entitled to bid on a government contract or be eligible for a subcontract. The DAR and FPR permit a company to be suspended for up to 18 months pending the bringing of a case by the Department of Justice. Although the suspended company may request a hearing, the government can refuse to hold a hearing. A company also can be debarred from holding a government contract or subcontract for a

specified period of time after an opportunity for a hearing. In some cases the statutes mandate a fixed, mandatory debarment period, e.g., 3 years for violations of the Davis-Bacon, Service Contract, and Buy American Acts. In other situations, the debarment period is discretionary, but may not exceed 3 years. While certain debarment sanctions must be observed by all agencies, some need not be; e.g., -- a fraud debarment by one agency is not binding on other agencies which may continue to do business with that debarred firm. In addition, agency debarment procedures often lack basic procedural safeguards, including the right to a trial-type hearing to resolve disputed facts.

A special committee of the Public Contract Law Section has been studying the problems associated with the present suspension and debarment procedures. We hope to have later this year the report of the special committee together with its recommendation for reforming the suspension and debarment procedures.

Conclusion

Mr. Chairman, the subject of Federal procurement is very complex. It concerns business relationships as well as legal relationships, and is governed by literally thousands of statutes, regulations, procedures, handbooks and manuals.

There is a basic need to recognize that procurement is not an end in itself, but should function to enable the government to obtain goods and services that will satisfy user requirements at fair and reasonable prices. There are legitimate restrictions and conditions that should apply to Federal procurement because public funds are involved. But there also is a need to avoid imposing restrictions and conditions that impede marketplace competition, cause prospective suppliers to shun government contracts, or unnecessarily increase the cost of goods and services to the government.

We hope our statement and identification of some of the specific areas of concern will be helpful in your consideration of procurement reform legislation.

Mr. Chairman, we will be glad to respond to any questions you or members of the Subcommittee may have.



AMERICAN BAR ASSOCIATION

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STATEMENT OF

ROY S. MITCHELL

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON FEDERAL SPENDING PRACTICES &
OPEN GOVERNMENT

of the

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

pertaining to

S.1264, THE FEDERAL ACQUISITION ACT OF 1977

July 22, 1977

Mr. Chairman and Members of the Subcommittee:

The American Bar Association appreciates this opportunity to present this statement on S.1264, the proposed Federal Acquisition Act of 1977. I am Roy S. Mitchell, Chairman of the ABA's Public Contract Law Section, and I have been authorized to present ABA's views on this important legislation.

With me today are David L. Hirsch, senior corporate counsel of Norris Industries, Inc., who is chairman of the Section's Ad Hoc Committee to Study S.1264, and O. S. Hiestand of the law firm of Morgan, Lewis & Bockius, also a member of the ad hoc committee. The other member of the ad hoc committee, George M. Coburn of the law firm of vom Baur, Coburn, Simmons & Turtle, is unable to be here today.

The views presented to you today are a distillation of an effort which spanned 18 months and includes the input of hundreds of attorneys who practice in the field of public contract law.

The report of the ad hoc committee has been reviewed on four different occasions by the Council of the Public Contract Law Section at public meetings held throughout the United States. In addition, each of the various committees of the Section have been provided an opportunity to comment on the report. Finally, other sections of the American Bar Association were given the opportunity to review the position prior to its approval by the Board of Governors of the American Bar Association on

July 11, 1977. A copy of the resolution approved by the Board of Governors is attached to this statement.

Before launching on a discussion of changes we suggest, I would like to take this opportunity to state that the American Bar Association endorses the concepts and the goals expressed in S.1264. On behalf of the American Bar Association we would like to thank Senator Chiles and his staff for the fine effort which resulted in S.1264.

The following is a summary of the principal areas of S.1264 in which changes are recommended. The Section's report, which was the basis for Board of Governors action, is attached to these prepared remarks. The report covers the points stressed in my oral statement and also includes additional drafting revisions that we believe will further improve the bill.

The bill as now drafted represents a major step forward in the improvement of the procurement process. The American Bar Association believes that the expected improvement in the procurement process reflected in S.1264 should apply to all branches of government. As currently drafted, only the executive branch is included under the bill. If good procurement practices must be followed by the executive branch then surely Congress must require that good procurement practices must be followed by the legislative and judicial branches. We recommend that S.1264 be modified to include the legislative branch and the judicial branch. In order to avoid any potential argument that the Office

of Federal Procurement Policy would be establishing regulations for the legislative and judicial branches, it is recommended that the statute provide that all regulations issued by the Office of Federal Procurement Policy be endorsed by the Comptroller General of the United States, or his designee, when its regulations are applicable to the legislative branch and by the Chief Justice of the Supreme Court, or his designee, when its regulations are applicable to the judicial branch. We also recommend that all non-appropriated fund activities and wholly-owned government corporations be included in those activities which are subject to the requirements of S.1264. If the procurement practices required by the Federal Acquisition Act of 1977 protect the United States taxpayer when appropriated funds are expended, then those practices should protect the taxpayer who contributes to non-appropriated funds and who is impacted by the activities of wholly-owned government corporations.

Members of the American Bar Association recognize that the federal government leases considerable office space to house its employees. Leasing by the federal government of improvements to real property should also come within the requirements of S.1264. As currently drafted, the leasing of office space by the federal government has been excluded. We can find no legitimate purpose for excluding such activities from the dictates of this fine legislation, and, therefore, recommend that the leasing of improvements by the federal government be made subject to the requirements of the legislation.

At present, the bill (Section 101(a)) provides that property and services will be acquired in accordance with the policies of Section 2 and will utilize one of the procurement methods authorized in Section 101(a). We endorse the policies contained in Section 2. However, we believe it is unwise to commingle these policy statements with the description of procurement methods.

The legislation places severe restrictions on the use of single source procurement. These restrictions were included in the bill in order to reduce the amount of single source procurement which occurs each year. We are concerned that the so-called "cure" included in the bill is worse than the "sickness". The legislation requires the procuring activity to solicit the marketplace even though it is known in advance that an award will be made to only one contractor. This approach will require potential contractors to prepare proposals at their own expense even though there is no possibility that an award will be made to any contractor other than the one the procuring agency knows will obtain the award prior to the time the procuring agency solicited the other proposals. As an illustration, if it is determined by the procuring activity that it must retain a specific contractor's production capability during peacetime in order that the contractor's capability will be available during wartime, seeking proposals from other contractors who do not have this capability would be an expense the other contractors would be required to endure without any possibility of reward.

Furthermore, it is likely that these other contractors will object to this procedure and will hold up the award to the chosen contractor whose mobilization base the government seeks to protect. We believe that by publicly advertising the name of the sole source contractor and the amount of the award prior to making the award other potential contractors can object and be heard and that testing the marketplace at the expense of all potential contractors is a serious mistake. We recommend that the Office of Federal Procurement Policy be instructed by the legislation to establish regulations which will indicate the specific reasons for single source procurement. These reasons should include national emergency, where time will not permit competition, protection of the mobilization base, research and development, just to name a few. We believe that sole source procurement is not bad per se and that properly implemented regulations issued by OFPP will reduce the amount of sole source procurement and achieve the objectives of the legislation.

The use of competitive negotiating as an alternative method of procurement is recognized in S.1264. We strongly support this change in the existing procurement statutes. Competitive negotiation is an important procurement tool for many types of sophisticated and complex purchases. This method of procurement strengthens competition and is cost effective by providing full opportunity for bidders to know what the government wants and for the government to better understand exactly what a supplier is proposing.

However, as presently drafted, S.1264 does not permit negotiations on price of technical proposals. Written or oral discussions are permitted only for the purpose of obtaining needed clarification on extension of offers.

These limitations were imposed in order to prevent auctioneering and technical transfusion. The limitations prevent the contracting officer from obtaining any information from the other offerors and limits actual negotiation to discussions with the low offeror. There are many times when offerors should be permitted to discuss their proposal prior to making their best and final offer. A good technical proposal might be rejected because a slight modification could not be made. We recommend that technical transfusion and auctioneering be forbidden by the statute and that negotiations be permitted with all offerors when the procuring officials believe that negotiations are warranted. Both auctioneering and technical transfusion can be severely limited if not stopped by detailed regulations issued by OFPP.

We also recommend a revision to provide more flexibility in the use of "total cost" evaluations and functional specifications. The present mandatory requirements, we believe, are impractical, would be too costly, and could prohibit contracting based on a single approach in situations where it is the best interest of the government.

We recommend two additions to the legislation which we believe will be in the public interest. One addition deals with the need for a statute of limitations for claims by the government against

the contractor under a contract and the other deals with unsolicited proposals.

As attorneys for both the government and private industry, we find that claims by the government against a contractor under a completed contract are growing in number. With the passage of Public Law 87-653, "Truth-in-Pricing", and Public Law 93-379, the "Cost Accounting Standards" Act, the government can reach back into a completed contract eight years after completion of deliveries and file a claim against the contractor at either the Armed Services Board of Contract Appeals or some similar administrative tribunal. Although all contracts contain an audit clause which limits the government's right to audit to three years after date of final payment, the audit report setting forth the grounds for a claim might languish for three or four years before a contracting officer issues a final decision which can be appealed to an agency board such as the Armed Services Board of Contract Appeals. A contractor's ability to submit a claim against the government under a contract provision is forever closed once the contractor accepts final payment or, under a cost reimbursement type contract, once a contractor waives his right to such claims against the government. We recommend that a four year statute of limitation be included in the legislation. This four year period would commence at the date of final payment and would end four years later. This approach would permit the government the normal three years after date of payment for audit and an additional year to prepare and make its claim against the contractor. A statute of limitations such as

the one we propose would permit a contractor to reduce the volume of records he must retain and would, of course, thereby eliminate considerable costs of record retention. In addition, the government would be forced to bring its claim against a contractor when the evidence is both available and reasonably fresh in the minds of the parties.

Senate Bill 1264 contains no provision which deals with unsolicited proposals. The Commission on Government Procurement stated in recommendation #7 that the government should eliminate restraints which discourage the generation and acceptance of innovative ideas through unsolicited proposals. We believe that any acquisition statute should include a statement which urges the preparation of unsolicited proposals and a reward to those contractors whose proposals are sufficiently unique to justify acceptance by the government. We recommend that the reward should ordinarily be the award of a contract for the initial procurement or for the initial research and development. This or an equivalent reward should be to the source who prepared the unsolicited proposal. On the other hand a unique unsolicited proposal which is not in the public domain should be returned by the government to the offeror when it is not used. The government should be forbidden from taking a unique idea and utilizing it to solicit private industry in general. The Commission on Government Procurement concluded that unsolicited proposals were the primary source through which the government obtains creative ideas from private industry for satisfying the national needs. Without the incentive of a potential single source award, contractors would be discouraged

from investing their capital and time in preparing unsolicited proposals.

Finally, as members of the bar, we must speak to Title VII, protests. We strongly support Title VII as it is currently drafted since it provides the availability of an effective remedy as the most practicable means of redressing erroneous or arbitrary agency actions as they affect the elements of the acquisition process involving selection of sources and award of contracts. We recommend, as did the Commission on Government Procurement, that the protest remedy should be continued to be adjudicated administratively by the Comptroller General. He and his staff have 50 years of experience in adjudicating bid protests. Furthermore, his office has a disinterestedness in the outcome and an absence of bias towards the procurement decision under challenge. It is unlikely that the contracting agencies could ever obtain the public confidence if the decisions on bid protests were to be handled within the agencies. There would always be a fear expressed by the old saw of a "fox guarding the hen house".

Senator Chiles, when introducing S.1264, indicated a "widespread" dissatisfaction with the GAO's handling and implementation of protests. We believe that this dissatisfaction has been engendered by an absence of clear legislative authority for the Comptroller General to perform this needed corrective role. The scope of the Comptroller General's authority was questioned in 1971 by a prior Attorney General of the United States and again recently on March 17, 1977 by Attorney General Bell. Given

these challenges of legal authority of the Comptroller General to bind the contracting agency by his bid protest decision, it is remarkable that the process has worked as well as it has.

According to the Comptroller General's statistics from the decisions during the period July 1975 through June 1976, of 472 protests decided after the award of a contract to another party, the GAO recommended cancellation or termination of the award in only 13 cases. The statistics further indicate a substantially higher percentage of protests being decided in favor of the contractor when those protests are decided before award. Much of this apparent unfairness to contractors with meritorious protests, we believe, will be cured by the enactment of Title VII. Under the authority of Title VII, the Comptroller General will be able to compel timely responses by contracting agencies to non-frivolous protests and to prevent contract awards from being made except only in those rare cases when an agency head personally finds in writing "that the interest of the United States will not permit awaiting the decision of the Comptroller General."

Under Title VII, the informal procedure will permit the expeditious handling of the protest. However, for good cause shown and when there are material issues of fact that the production of records or the taking of testimony before the GAO may resolve, Title VII permits this more formal procedure and even allows for subpoenas where appropriate. Nevertheless, because there is no guarantee of the opportunity for a trial-type hearing before the GAO, we recommend that the decisions of the Comptroller

General be made binding only on the contracting agency thereby permitting other interested parties the right to a de novo review in a federal court. The language as written in Section 703(b) makes the decision by the Comptroller General binding on all parties. This language should be changed to make the decision of the Comptroller General binding only on the contracting agency. We do not understand it to be congressional intent to preclude judicial review at the request of a bidder or contractor. We strongly believe that nothing in the bill or its history should indicate that it is the intent of Congress to preclude such judicial review.

This brings us to the constitutional questions raised by Attorney General Bell and others about the powers of Congress to vest in the Comptroller General the authority conferred by Title VII to declare that solicitations, proposed awards and awards do not comport with law or regulation, to declare that a contract so awarded shall be terminated for the convenience of the government, and to declare the entitlement of an appropriate party to bid and proposal preparation costs, and to make such declarations binding at least on the contracting agencies involved.

We have considered these questions, and by letter to Senator Chiles as Chairman of this Subcommittee we shall express the opinion that Title VII is entirely within the legislative power of Congress to enact. We reach this conclusion primarily for the reason that in deciding bid protests, as in settling public accounts under Sections 304 and 305 of the Budget and Accounting

Act of 1921 (31 U.S.C. §§44,71,72,74), the Comptroller General is acting in an executive capacity but free of any direction or control by the executive departments as provided in Section 301 of the Budget and Accounting Act of 1921 (31 U.S.C. §41) and not as a legislative officer or agent of Congress as in conducting the auditing function under the Accounting and Auditing Act of 1950 (64 Stat. 834, 31 U.S.C. §§65-67).

For these reasons, we strongly support the enactment of Title VII with the modifications indicated as assuring the more effective performance of the protest adjudication function in the public interest than the Comptroller General is able to do without the authority that Title VII would provide. In short, he needs these tools to do the job well and we ask that you provide them.

In conclusion, we particularly want to applaud Senator Chiles and his staff for including a requirement for price analysis and a constructive way for eliminating a portion of the excessive surveillance now imposed upon the private sector. Both of these major improvements to the procurement process will reduce costs to the taxpayer and will serve the public interest.

Thank you, Mr. Chairman, for this opportunity to present the position of the American Bar Association. We will be glad to discuss any questions you may have now or with the Subcommittee staff at a later date.

RESOLUTION APPROVED BY
THE AMERICAN BAR ASSOCIATION
BOARD OF GOVERNORS
July 7, 1977

AMERICAN BAR ASSOCIATION

REPORT TO THE
BOARD OF GOVERNORS

SECTION OF PUBLIC CONTRACT LAW

RECOMMENDATION

The Section of Public Contract Law hereby recommends that the Board of Governors of the American Bar Association approve the following resolution for appropriate transmittal to Congress:

BE IT RESOLVED, That the American Bar Association endorses the concepts and goals expressed in S.1264, entitled the Federal Acquisition Act of 1977, urges the amendment thereof in certain respects as set forth in the attached report, tenders the assistance of the Section of Public Contract Law to the appropriate committees of Congress for the final formulation thereof, and authorizes the President or his designee to present this endorsement and offer of assistance to the appropriate Committees of Congress.

REPORTBACKGROUND

S.1264, introduced by Senator Lawton Chiles of Florida, a copy of which is attached, would consolidate into one statute more than one thousand different statutes relating to procurement, and, in addition, would modernize Federal procurement law. It furthermore would introduce several innovative concepts which Senator Chiles and others believe would effect great economies and improvements in the procurement system. S.1264 is a modification of S.3005 which was introduced by Senator Chiles last year but which remained unenacted at the close of the 1976 legislative session.

With few exceptions, the bill is concerned with the machinery, procedures and safeguards of procurement. It deals primarily and almost exclusively in types of matters with which members of the Public Contract Law Section, in practice either for the Government or as members of the private bar, have had a great deal of experience. The bill, because of its breadth, also presents difficult problems of draftsmanship with respect to which the continuing advice and assistance of members of the Section of Public Contract Law would be useful. This is particularly so as indicated by the proposed amendments listed as desirable in later sections of this report.

The Council of the Section, at its May 1976 meeting, spent parts of two days reviewing the provisions of S.3005 and discussing its terms with a representative of Senator Chiles' office. The process was repeated for part of a day at its February 1977 meeting with regard to what has now become Title VII of S.1264, again for part of a day with regard to newly introduced S.1264 at its April 1977 meeting, and finally the entirety of S.1264 at a special meeting in June 1977. As a result, a special committee of the Section prepared this report which is representative of the views considered at the Council meeting and sheds light on the matters on which amendment is desired or on which the help of the Section to the Congress may be warranted. We understand that Senator Chiles and the staff of the Subcommittee on Federal Spending Practices, Efficiency and Open Government are desirous of having the Section continue to work actively with them in further refinement of the measure and that they

may be amenable to certain of the detailed amendments set forth later herein.

In August 1976, the House of Delegates approved a resolution endorsing S.1264's predecessor bill, S.3005, in principle, stating as follows:

BE IT RESOLVED, That the American Bar Association endorses in principle the concepts and goals expressed in S.3005, entitled the Federal Acquisition Act of 1976, tenders the assistance of the Section of Public Contract Law to the appropriate Committees of Congress for the final formulation thereof, and authorizes the President or his designee to present this endorsement and offer of assistance to the appropriate Committees of the Congress.

The proposed resolution has been developed to be continually responsive to the assistance sought by Senator Chiles and the Subcommittee Staff on S.1264. The supporting rationale for each of the elements of the proposed resolution, including recommended amendments thereto, is set forth below. Where an adjustment previously recommended has been made or a change has been made for some other purpose, only a one sentence acknowledgment is indicated in the report.

SECTION 2 - DECLARATION OF POLICY

The policy sections are generally the same except for Section 2.(b)(1), (5) and (7). The Section generally agrees with the Policy Section.

SECTION 3 - DEFINITIONS

This section has been entirely changed and the Section generally agrees with the definitions. Of particular significance, the term "acquisition" has been defined to include such related functions as determination of the particular public need; solicitation; selection of sources; award of contracts; contract financing and contract performance.

Section 3.(b) limits the application of the statute to an "executive agency" which is defined by Section 101 of

Title V United States Code, an independent establishment as defined by Section 104 of Title V U.S.C. (except that the GAO is omitted), a military department as defined by Section 102 of Title V U.S.C. and the United States Postal Service.

RECOMMENDATION

It is recommended that all non-appropriated fund activities, the Congress of the United States, the Government Printing Office, the General Accounting Office, the Library of Congress, the Architect of the Capitol, wholly owned Government corporations and the Judicial Board should be included under the coverage of the statute. It is recommended that the Comptroller General endorse all regulations issued under this statute by OFPP which are to be applied to the Legislative Branch and that the Chief Justice of the United States endorse all regulations issued under this statute, e.g., OFPP which are to be applied to the Judicial Branch.

REASONS FOR RECOMMENDATION

1. If the statute which will be the basis for all procurement regulations is to regulate all federal acquisition, then clearly all federal acquisition should be encompassed by the statute.
2. Only grants should be excluded. The Section believes that the question of including grants under an acquisition statute should be a matter to be determined by the Commission on Grants established by the 94th Congress. If, at a later date, grants should be included then the statute should be amended to reflect that decision.
3. Only those regulations receiving the endorsement of the Comptroller General or the Chief Justice of the Supreme Court would be binding on the Legislative or Judicial Branch. Regulations issued by OFPP would be binding on all other parties including wholly owned Government corporations and non-appropriated fund activities. This procedural change would safeguard the separation of powers and should make a "Government-wide" statute more acceptable to the Congress.

Section 3(e) defined "property" to exclude real property and leasehold interests therein. S.3005 included leasehold interests in real property.

RECOMMENDATION

It is recommended that leasehold interests in real property be included in the Act.

REASONS FOR RECOMMENDATION

1. The Government acquired by lease a considerable amount of office space and has been criticized for the procurement methods used. Procurement in accordance with the statute should help to remedy the problem of poor procurement practices.

TITLE I - ACQUISITION METHODS AND REGULATORY GUIDANCE

SECTION 101 - ACQUISITION METHODS

Section 101(a)

This section requires that property and services will be acquired in accordance with the policies in Section 2 and will utilize one of the procurement methods authorized in Section 101(a).

RECOMMENDATION

The Section recommends that this section delete the reference to Section 2.

REASONS FOR RECOMMENDATION

1. The selection of the procurement method has no relationship to the policy statements in Section 2.
2. The Section believes that it is inappropriate to co-mingle policy and procedure.

SECTION 101(a) (2) and (a) (3)

RECOMMENDATION

The word "competitive" should be deleted. The word

"competitive" should also be deleted from the headings of Titles III and IV.

REASON FOR RECOMMENDATION

1. Single Source Exceptions apply to Title II, Title III and Title IV.
2. The headings to the titles should be consistent with the contents.

SECTION 101(b)

This section provides that the methods described in Section 101(a) are "equally valid alternatives" and permit the Office of Federal Procurement Policy to establish criteria for the use of competitive negotiations, formal advertised procurement or competitive small purchase methods, in addition to those set forth in the statute.

RECOMMENDATION

Revise this section to read:

"The method of acquiring property or services shall be selected on the basis of the nature of the product or service being acquired, the circumstances of the acquisition, and the policies set forth in this Act as implemented by criteria established by OFPP."

REASONS FOR RECOMMENDATION

1. The alternatives are not equally valid.
2. OFPP should not have the authority to change the law.

SECTION 102 - REGULATORY COMPLIANCE

This section requires the Administrator of OFPP to develop one regulation for all federal agencies within two years after the date of enactment.

The Section recommended before that a period of two years was unacceptable and recommended five years in lieu thereof.

TITLE II - ACQUISITION BY COMPETITIVE SEALED BIDSSECTION 201 - CRITERIA FOR USE

As before, there are seven criteria which if met may require the use of formal advertised procurement. The criteria are exactly the same as those set forth in S.3005.

The major change in this section is that the word "should" has been inserted in the introductory language rather than the word "shall." It appears that the use of the criteria is not mandatory but only suggested and that under Section 101 the Administrator of OFPP can establish mandatory criteria.

The insertion of the word "should" in lieu of "shall" modulates the effect of this change.

RECOMMENDATION

The Section agrees with the language provided the word "should" does not become "shall."

SECTIONS 202 & 203 - INVITATION FOR SEALED BIDS - EVALUATION, AWARD, AND NOTIFICATIONS

Paragraphs (a) and (b) of Section 202 are the same as before. Paragraphs (c), (d) and (e) are substantial changes from the past. Essentially, where practical, agencies should use functional terms and specifications. If definitive product specifications must be used then the HPA must approve their use. Finally, two step procurement is suggested as the method to be used in permitting functional or performance specifications prior to pricing.

The Section agrees with this approach and also agrees with Section 203.

TITLE III - ACQUISITION BY COMPETITIVE NEGOTIATIONSECTION 301 - CRITERIA FOR USE

This section is the same as before.

SECTION 302 - SOLICITATIONS

Section 302(a) is the same as before. Section 302(b) (1) and (2) has been changed substantially. There is a new requirement that if price is included as a primary or significant factor, the Government's evaluation shall be based to the maximum extent practicable on the "total cost" to meet the federal need and not on the cost of completing any initial or partial segments of activity. In the Definition Section the words "total cost" include maintenance, disposal, training, etc. It appears to the Section that except in a systems type procurement it would be very difficult to include these intangible costs to the Government in a competitive negotiation.

RECOMMENDATION

The Section recommends that the following language be inserted in lieu of 302(b) (1) and (2):

"(b) Each solicitation shall include the method to be employed and the importance of the factors to be used during competitive evaluation and for final selection. The Government's cost evaluation should be based, to the maximum extent practicable, on the total cost to meet the Federal need as determined by objective cost factors set forth in the solicitation. Changes in the Government's requirements, changes in the methodology of evaluation and selection, and changes in the evaluation factors shall promptly be communicated in writing to all competitors."

REASONS FOR RECOMMENDATION

1. To evaluate the cost of training, maintenance, disposal, etc. in the purchase of most goods and services would be most difficult and is usually quite arbitrary. The Section commends the Senator's staff for this approach but feels that it should not be mandatory since it may lead to protests which could be avoided if the approach is only used where the information is available to the Government in a reasonably accurate and precise form.
2. The Section feels it would be both impractical and costly for the Government to estimate the "total cost" where the quantity to be purchased is not substantial.
3. The Section believes that the language it recommends expresses the intent of Senator Chiles and his staff.

SECTION 302(c)

Section 302(c) includes a requirement that solicitations shall not prescribe performance characteristics based on a single approach and solicitations shall not prescribe technical characteristics obtained from any potential source.

RECOMMENDATION

It is recommended that 302(c) be deleted and changed as follows:

"302(c) To the extent practicable and consistent with needs of the agency solicitations shall:

- (1) set forth the public need in functional terms so as to permit the application of a variety of technological approaches and elicit the most promising competing alternatives, and
- (2) not be based on a single approach."

REASONS FOR RECOMMENDATION

1. It is not uncommon that the Government seeks to buy something based on performance characteristics based on a single approach. The single approach may be the only approach known to work in a highly technical situation. Considerable research and development may have resulted in the approach chosen by the Government after a long period of time and substantial costs have been expended.
2. There are occasions where the solicitation must prescribe technical characteristics obtained from a competitor who accomplished the research and development. If the Government were prevented from using this information, the data created from the research and development contract would be unavailable for later competition.

SECTION 302(d)

This section is the same as before.

SECTION 303 - EVALUATION, AWARD AND NOTIFICATIONS

SECTION 303(a)

Section 303(a) does not permit negotiations on price or technical proposals. Written or oral discussions are permitted only for the purpose of obtaining needed clarification or extension of offers.

RECOMMENDATION

The Section recommends that section 303(a) be deleted and the following substituted in lieu thereof:

"Written or oral discussions may be conducted with all qualified offerors who remain in a competitive range for the purpose of obtaining any needed modifications of offers. An initial offer may be accepted without discussion."

REASONS FOR RECOMMENDATION

1. The statute as written would prevent negotiations of price or technical proposals and would limit discussions to clarification or extension of offers. It is the Section's understanding that this reduction in negotiation authority was included in the statute in order to prevent technical transfusion and auctioneering. It is the Section's belief that discussions concerning price and technical proposals are required if acquisition by competitive negotiation as opposed to acquisition by sealed bids is to present a substantial alternative method of procurement to the procuring official. The language set forth in Section 302(a) would limit competitive negotiation to the four step approach being tried on an experimental basis by DOD. There may be times when the four step approach would be inappropriate when negotiations concerning price and technical proposals is required. The determination of when the four step method is to be used should be left to procurement regulations issued by OFPP. The statute should permit negotiations and leave the regulation of negotiations to OFPP. Under the current language it would be impossible to negotiate terms and conditions, type of contract, etc.
2. Forbidding transfusion and auctioneering is, of course, in the public interest. Currently both are forbidden by regulation. The Section sees no purpose in presenting statutory language on these subjects and believes that

the problem involved with technical transfusion and auctioneering is a problem of enforcement of existing policies which cannot be cured by legislation. In the alternative, if it is determined by Senator Chiles that language is required in the statute which forbids technical transfusion and auctioneering, the Section would interpose no objections to such language and would be willing to assist Senator Chiles and his staff in drafting the requisite statutory verbage.

SECTION 304 - SINGLE SOURCE EXCEPTIONS

SECTION 304(a)

With the exception of permitting the Head of an Agency to negotiate a sole source award in the event of public exigency or national emergency, the language in this section is the same as before. Previously the Section objected to requiring a solicitation via competitive negotiation or by formal advertised procurement before the Head of an Agency could make a determination to negotiate with a single source.

RECOMMENDATION

As before, the Section recommends that the Head of an Agency be authorized to make a sole source procurement decision in those situations where formal advertising or competitive negotiations cannot be utilized, subject to appropriate contracting officer documentation. The detailed refinement of classes of single source procurement should be established by the Administrator of the Office of Federal Procurement Policy. Exceptions such as mobilization and national emergency should be considered by OFPP.

REASONS FOR RECOMMENDATION

1. There are many instances where procuring officials know that only one source is appropriate. To solicit nation-wide and then to cancel the solicitation in order to accomplish a single source solicitation is wasteful if it is known in advance that that single source will receive the contract. The language in Section 304 should be changed as a minimum to permit the decision to be made before the market is tested.

2. In addition to the great expense of soliciting nationwide it would also be expected that considerable time would be wasted in seeking sources when procuring officials know that only one source can do the job.

SECTION 304(b)

This section has been amended to reflect the suggestions made by this Section and is satisfactory.

SECTION 304(c) (UNSOLICITED PROPOSALS)

The Commission on Government Procurement Recommendation 7 stated:

"Eliminate restraints which discourage the generation and acceptance of innovative ideas through unsolicited proposals."

The proposed legislation appears to have omitted any language dealing with unsolicited proposals.

RECOMMENDATION

The Section recommends that a Section 304(c) be added to the Bill and that the Section should read as follows:

"Procurement should be effected by competitive methods whenever the substance of an unsolicited proposal is available to the Government without restriction from another source, or its substance closely resembles that of a pending competitive solicitation, or is otherwise not sufficiently unique to justify acceptance. However, when the substance of such a proposal demonstrates an innovative or unique concept, the Government should initially attempt to negotiate a single source procurement with the submitter before initiating a competitive solicitation. When procurement is intended and competition is decided upon, the unsolicited proposal shall be returned to the submitter together with the reason for the return and the contents of the unsolicited proposal shall in no way be used by the Government."

REASON FOR RECOMMENDATION

The Commission on Government Procurement in its studies relating to the acquisition of research and development, concluded that unsolicited proposals were a primary

source through which the Government obtained creative ideas from the private sector for satisfying the nation's needs. Without the incentive of a possible single source award, contractors would be discouraged from submitting unsolicited proposals and this valuable input to Government planning and advanced technology would be lost.

SECTION 305 - PRICE ANALYSIS AND COST DATA

Due to suggestions on the part of this Section and others, price analysis, as opposed to cost analysis, has been inserted into the statute for all negotiated awards greater than \$10,000 but less than \$500,000, or made at an established catalog or a market price of a commercial item sold in substantial quantities to the general public, or set by law, or where prices are based on adequate price competition, or where recent competitive purchases were made under relatively similar circumstances. The new provision requires a certification as to accuracy and completeness as of the date of agreement. The certification relates to "price data". However, the statute does not require that a clause be included in the contract which would after the fact reduce the contractor's price for defective "price data." Cost data, the Certificate of Current Cost or Pricing Data and the Price Reduction for Defective Cost or Pricing Data Clause would be used in a sole source award or other negotiated contracts where the contract or sub-contract does not fall into the five exceptions permitting price analysis.

RECOMMENDATION

The Section concurs with the approach taken in Section 305. However, it believes that the following language should be inserted in the statute:

"PRICE ANALYSIS AND PRICE DATA

Section 305(a) The determination of price under a competitive negotiation shall utilize price analysis techniques to analyze and evaluate the reasonableness of offers where --

- (1) the price of the contract, subcontract, change or modification is less than \$500,000, except that when the head of the procuring agency finds that this technique does not yield a fair and reasonable price, he may require cost analysis and cost data for

contracts, subcontracts, changes or modifications in excess of \$100,000; or

(2) the price is an established catalog or a market price of a commercial item sold in substantial quantities to the general public. (Note: This includes the use of multiple award techniques for such items; or

(3) the price is already set by law or regulation; or

(4) negotiation is based on adequate price competition, wherein price is a primary or significant factor; or

(5) there was recent competitive purchase under relatively similar circumstances.

(b) Prior to any award under Section 305(a), the contractor or subcontractor shall submit or identify in writing price data bearing on the reasonableness of the offer. Each such contractor or subcontractor shall certify that, to the best of his knowledge and belief, the part of such price data which consists of actual prices paid within the previous year or to be paid and the related dates, quantities and item descriptions are accurate, current and complete up to a time as close as practicable to the date of the certificate.

(c) (Insert Section 305(d) here)

(d) (Insert Section 305(e) here)

COST DATA

Section 306(a) (This section (a new Section 306) consists of the present paragraphs 305(b) through 305(d) with changes of references as appropriate.)"

The Section further recommends that Section 3 (Definitions) be amended to add the following definition of "Cost Data" as (i) and that (i) (the term "protest") be changed to (j):

"The term 'cost data' means all facts existing up to a time proximate to the time of agreement on price, as stipulated by the parties, which prudent

buyers and sellers would reasonably expect to have a significant effect on price negotiations. Being factual, these data are that type of information that can be verified as being fact rather than judgments or estimates. They do not reflect on the accuracy of the contractor's judgment about estimated future costs or projections; they do, however, reflect on the data upon which the contractor based his judgment."

REASONS FOR RECOMMENDATION

1. The redrafted section contains the essence of the approach proposed by Senator Chiles and his staff in a form which will be more adaptable to the day-to-day efforts of procurement officials.
2. The proposal permits the HPA to require cost analysis and cost data for cause for procurements, changes, etc. in excess of \$100,000. This reflects current practice.
3. The certification has been limited to actual prices and to a period of one year.
4. There is no Defective Price Clause recommended since one is not used now and is not needed.
5. The Waiver and Inflation Adjustment provisions, Sections 305(d) and (e), are added to the Price Analysis Section. As before they are also recommended for use in the Cost Analysis Section.

SECTION 306 - ACCESS TO RECORDS

This section has been changed but there is no substantial problem with the language.

RECOMMENDATION

It is recommended that claims under a contract by the Government against a contractor be limited to four years after the date of final payment under the contract.

REASONS FOR RECOMMENDATION

1. There is currently no statute of limitations for claims by the Government against the contractor under a contract. A DCAA audit completed within

the three year period may languish for two or three years more before a claim is issued by the Government. Claims such as warranties, truth-in-pricing, CAS, etc. leave the contractor's records open for as much as eight to ten years.

2. Claims by the contractor against the Government under a contract are eliminated by final payment under a fixed price contract and by certification under a cost type contract.
3. Such a statute of limitations would permit the contractor to dispose of his records thereby reducing costs to the Government for record retention.
4. Such a statute of limitations would motivate the Government to amass its claims, if any, and file them while the evidence is reasonably available.

TITLE IV - ACQUISITION BY COMPETITIVE SMALL PURCHASE PROCEDURES METHOD

This portion of the statute is acceptable to the Section as written and is similar to that included in S.3005.

TITLE V - GENERAL PROVISIONS

SECTION 501 - CONTRACT TYPES

SECTIONS 501(a) and (b)

Section 501(a) is a clear requirement. Everything in 501(b) is redundant.

RECOMMENDATION

Section 501(b) should be deleted.

REASON FOR RECOMMENDATION

This section undercuts (a) and is a limitation on rational judgment.

SECTION 502 - WARRANTY AGAINST CONTINGENT FEES

This section is acceptable to the Section.

SECTION 503 - CANCELLATIONS AND REJECTIONS

Again, as before, the Contracting Officer is permitted to cancel or withdraw invitations and solicitations before award.

RECOMMENDATION

As before, it is recommended that a cancellation and rejection of all bids only be permitted for the most "cogent and compelling reasons."

REASON FOR RECOMMENDATION

The words "cogent and compelling reasons" are currently used as a test by the GAO to determine if the cancellation of the procurement and the rejection of all bids was fair and reasonable. This test protects the bidders who have invested time and money in preparing their bids for submission to the Government.

SECTION 504 - MULTIYEAR CONTRACTS

This section is acceptable to the Section.

SECTION 505 - ADVANCE, PARTIAL AND PROGRESS PAYMENTS

This section is acceptable to the Section.

SECTION 506 - REMISSION OF LIQUIDATED DAMAGES

This section is acceptable to the Section.

SECTION 507 - DETERMINATIONS AND FINDINGS

This section is acceptable to the Section if one change is made.

RECOMMENDATION

The word "approval" should be added after the word "findings" in Section 507(a).

REASON FOR RECOMMENDATION

Unless approval of use of definitive product specifications can be approved as a class by the HPA under Section 202(d), the HPA would be inundated with thousands of separate requests at places like AFLC, etc.

SECTION 508 - COMPETITIVE BIDDING INFORMATION

This section provides that the procuring officials shall assist the United States Attorney General in any prosecution or other action by the United States under the antitrust laws or other statutes enforced by the Attorney General. There would appear to be no need for this section; however, the Section has no objection to its contents.

SECTION 509 - GOVERNMENT SURVEILLANCE REQUIREMENTS

This section has been modified to reflect the Section's suggestions.

SECTION 510 - MAINTENANCE OF REGULATIONS

This section is acceptable to the Section.

TITLE VI - DELEGATION OF AUTHORITY

This title is acceptable to the Section. However, the HPA should be allowed to make judgments under Section 509 for non-statutory requirements and only the Agency Head should be permitted to authorize an award while a protest is pending (Title VI should reflect Section 702(b) of Title VII).

TITLE VII - PROTESTS

This title reflects the Section of Public Contract Law's original position taken at its February 1976 Council Meeting, although it is noted that the Section of Administrative Law has raised questions of constitutionality with regard to it and has recommended that action on this portion of S.1264 be deferred until the Section of Administrative Law has had an opportunity to act on it. The Section of Public

Contract Law is informed that Attorney General Bell wrote a letter dated March 17, 1977 challenging the GAO's authority and anticipates that more definitive advice from the Section of Administrative Law and other sources in response to said letter may be available in time for the July hearings.

The Section states¹ that the language of Title VII is not intended to change existing law or cut off de novo judicial review by a federal court and requests that Senator Chiles and his staff make this matter of de novo judicial review a part of the legislative history to accompany the Bill. Similarly, the right to a de novo trial in a federal court is believed by the Section to be responsive to arguments that the "informal procedure" language included in the statute may deny a party to a protest adequate procedural due process.

RECOMMENDATION

Section 703(b) should be changed by deleting "...binding upon all interested parties including the executive agency or agencies involved." The following language should be included in lieu of the language deleted:

"...binding upon the contracting agency or agencies involved."

REASON FOR RECOMMENDATION

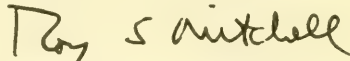
The Section considers that the decisions of the Comptroller General should have no greater finality than they presently have, namely, that they be final and conclusive on the contracting agency with other interested parties free to vindicate their claims in the courts, at least to the extent they otherwise have standing to do so. It is believed that the above explanations and changes, together with the anticipated response from the Section of Administrative Law and others with regard to Attorney General Bell's letter of March 17, 1977, will allow these matters to be adequately clarified by the time of the anticipated July hearings so that a definitive position may be taken at that time. If not, the Section of Public Contract Law will be guided accordingly.

TITLE VIII - AMENDMENTS AND REPEALS

The Section has not had the opportunity or the time to review this extensive list and anticipates that such a review will be accomplished in the future.

The Section commends Senator Chiles and his staff for a masterful effort in adjusting S.3005, now reintroduced as S.1264, to reflect the needs of the procurement community. Certain minor language deficiencies have been noted in the bill which will be brought to the Subcommittee Staff's attention at a later time, but the major considerations and recommendations of the Section are set forth herein.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Roy S. Mitchell". The signature is fluid and cursive, with the first name "Roy" being more prominent.

Roy S. Mitchell, Chairman
Public Contract Law Section

June 1977.

AMERICAN BAR ASSOCIATION

SECTION OF
PUBLIC CONTRACT
LAW



1155 EAST 60TH ST. CHICAGO, ILLINOIS 60637 TELEPHONE (312) 947-3863

July 22, 1977

M. BARDOZA



Senator Lawton M. Chiles

Chairman of the Senate Subcommittee on Federal

Spending Practices and Open Government

Room 443, Russell Office Building

United States Senate

Washington, D.C. 20510

Dear Senator Chiles:

This letter will serve as an addendum to my testimony of July 22, 1977 and sets forth the opinion of the Public Contract Law Section that Title VII of S. 1264, the Federal Acquisition Act of 1977, is within the legislative power of Congress. Constitutional questions have been raised about the power of Congress to vest authority in the Comptroller General to render binding decisions which hold that (1) solicitations, proposed awards, and awards do not comport with law or regulation, (2) that a contract so awarded shall be terminated for the convenience of the Government, and (3) that a protestor is entitled to bid and proposal preparation cost.

These constitutional questions, however, are based on the assumption that the Comptroller General is a purely legislative officer. As shown below, the current GAO enabling statute conceives of the Comptroller General as a member of the Executive Branch, although he is independent of any direction or control by the individual executive agencies. In addition, the Comptroller General acts as an executive officer, not as a legislative officer, in deciding bid protests. This is similar to his executive function in settling public accounts and in approving or disapproving payments made by executive agencies. In this executive capacity, the Comptroller General is constitutionally subject to Presidential removal incident to his performance of executive functions, and the statute does not divest the President of this power. Finally, the separation of powers doctrine does not apply to the necessary combination of executive and legislative functions within an agency such as the General Accounting Office.

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1. No more GAO cases
2. Double judgment + 12
3. But the case
4. Protection of executive decisions
5. Part VII has nothing to do with
6. Congress + executive branch
7. But there is a distinction -
8. That is one of the
9. Not the intention of
10. regulation.

I. IN DECIDING PROTESTS, THE COMPTROLLER GENERAL IS ACTING AS AN EXECUTIVE OFFICER.

A. The Comptroller General is Not Independent of the Executive Branch, but Only of the Executive Agencies.

The Comptroller General's enabling statute, the Budget and Accounting Act of 1951, provides that he shall be independent of the executive departments but specifically declines to render him independent of the Executive Branch itself. 31 U.S.C. §41 (1976). Thus, the statute, at least implicitly, conceives of the Comptroller General as a member of the Executive Branch. See 31 U.S.C. §65 (1976). Moreover, those provisions which require the Comptroller General to report to the President upon request concerning the work of his office, and to furnish information concerning expenditures and accounting to the Office of Management and Budget are further evidence of the Comptroller General's executive status, at least insofar as these functions are concerned, 31 U.S.C. §53 (1976).

See
Part VII of the

B. The Comptroller General Acts in an Executive Capacity in Settling Public Accounts.

It has long been recognized that the dual functions filled by the GAO require that the Comptroller General possess both legislative and executive powers. The Comptroller General's current involvement in bid protest matters derives from his statutory authority to settle public accounts. 31 U.S.C. §§44, 71, 72 and 74 (1976). In settling these accounts, the Comptroller General is acting in an executive capacity, although independent of any direction or control by the executive departments. 31 U.S.C. §41 (1976). In conducting the separate auditing function of the GAO under the Accounting and Auditing Act of 1950, 31 U.S.C. §§ 65-67 (1976), on the other hand, the Comptroller General is clearly acting as a legislative officer. See, H. Mansfield, The Comptroller General 83-4, (New Haven: Yale Univ. Press 1939).

This duality of functions was recently recognized in United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 99-100 (D.D.C.), Aff'd, 339 F.2d 753 (D.C. Cir. 1964). There, the court explained the two functions of the Comptroller General as follows:

"The Comptroller General is the head of the General Accounting Office, 31 U.S.C. §41. Unlike heads of most departments and establishments of the Government, he occupies a dual position and performs a two-fold function. First, he makes investigations of matters relating to the receipt, disbursement and application of public funds, and reports the results of his scrutiny to the Congress with appropriate recommendations. In addition he pursues investigations that may be ordered by either House of Congress, or by any Committee of either House, in matters relating to revenue, appropriations or expenditures, 31 U.S.C. §53. In performing these functions the status of the Comptroller General is that of an officer of the legislative branch of the Government. The Congress has comprehensive authority to undertake investigations in aid of legislation, or in connection with the appropriation of funds. Investigations are an aid to legislation and to the making of appropriations and are therefore auxiliary to the basic functions of the Congress. The Congress may conduct investigations either through Committees or through an official such as the Comptroller General.

The Comptroller General also has a second status as the chief accounting officer of the Government. His second principal function is that of approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned, 31 U.S.C. §71. This is an executive function and in performing it the Comptroller General acts as a member of the Executive branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function

and in part carry out executive duties, Humphrey's Executor v. United States, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611. Cf. Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. Thus we have developed in comparatively recent years a fourth type of Government agency, one that combines two kinds of basic powers.

The office of Comptroller General examines all vouchers and scrutinizes all payments made by Government disbursing officers. In case any payments are found excessive, improvident, or illegal, the accounts of the disbursing officer may be surcharged accordingly. The Comptroller General may also transmit such items to the Department of Justice with a view to bringing judicial proceedings in order to secure refunds from persons to whom erroneous payments have been made. The Comptroller General is not a law officer. He does not render legal opinions. His decisions are binding and conclusive only on the Executive branch of the Government, particularly on disbursing officers." (Emphasis added.)

While holding that the Comptroller General acts as an Executive officer and not as an agent of Congress in settling accounts of disbursing officers and in approving or disapproving payments made by government agencies, the court also implicitly established that his bid protest or advance decision procedures are executive functions:

"As a matter of convenience, the Comptroller General may render advance rulings on questions whether certain payments, if made, would or would not be approved by him, 31 U.S.C. §74, 3d paragraph. Such a course is conducive to fairness and efficiency. While the statute expressly authorizes the Comptroller General to do so, it would seem that even in the absence of an explicit provision such an activity would impliedly

be within his functions. Technically a decision of the Comptroller General upon a question so submitted to him, is not a legal opinion, but a ruling or an announcement that if certain payments were made by disbursing officers in the future, they would be passed or disallowed. The disapproval would be binding and conclusive on the disbursing officer but not upon the person to whom the payment might be made. It would still be open to the latter to contest any claim for refund and interpose any defense that he may have

Applying these principles to the case at bar, the decision of the Comptroller General in this instance is equivalent to an announcement that if the contract were made with the plaintiffs, he would disallow any payments that might be made by any disbursing officer thereunder."

234 F. Supp. at 100. (Emphasis added.)

Thus, the Comptroller General would be acting in an executive capacity in resolving bid protests under Title VII since the primary basis for bid protest decisions is the statutory authority to settle public accounts. Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1313-14 (D.C. Cir. 1971). A bid protest decision is an executive function because the Comptroller General is controlling procurement policy in requiring the award to be placed with the bidder he determines to be best qualified. Essentially, he is performing an executive function by directing to whom the contract will be awarded.

Furthermore, the enabling statute itself manifests the intent of Congress to give the Comptroller General executive powers and functions. The predecessor to the present Comptroller General, the Comptroller of the Treasury, had the power of disallowance over payments made by executive agencies because he was a member of the Executive Branch. The Budget and Accounting Act of 1951 vested all of the predecessor's powers and duties in the Comptroller General, and thus retained his position as an executive officer. 31 U.S.C. §44 (1976). Congress has also delegated to the GAO the additional executive

functions of administering other legislation, such as the Federal Election Campaign Act of 1971, 2 U.S.C. §§431-54 (1976). Finally, the Cost Accounting Standards Board is also within the control of the GAO and prescribes the accounting standards for all Government operations. See 31 U.S.C. §49 (1976) and 50 U.S.C. App. §2618 (1977).

In sum, it would seem undisputed that the Comptroller General, in the exercise of certain functions acts, as a member of the Executive Branch, regardless of his separate and additional legislative functions. The Comptroller General is functioning in the bid protest area in precisely the same manner as in settling public accounts or in rendering advance decisions on the propriety of proposed payments by executive agencies. Therefore, a separation of powers problem does not arise under Title VII because the Comptroller General is acting as an executive officer.

C. The Comptroller is Appointed by the President and Subject to His Removal Power.

The Comptroller General is appointed by the President in conformity with the Appointments Clause. 31 U.S.C. §42 (1976), Buckley v. Valeo, 424 U.S. 1, 128 n. 165 (1976). Despite this clear statutory provision, however, it has been contended that the Comptroller General is not an executive officer because he is not subject to removal by the President. Aside from the failure of this contention to address the initial question whether the nature of the Comptroller General's functions are executive, the statute itself does not bar the President from removing the Comptroller General. 31 U.S.C. §43 (1976). The statute provides only that Congress "may" remove him for certain enumerated reasons. It does not provide that the Comptroller General "shall only" be removed by these specific congressional procedures.

Furthermore, serious constitutional questions would arise as to the validity of Congress' complete exclusion of the President from the removal process. As Professor Mansfield states in his well thought-out treatise on the Comptroller General:

"The unconstitutionality of the Budget and Accounting Act [would follow] from the attempt of Congress to claim the removal power for itself, and not from what it confers on others." H. Mansfield, The Comptroller General, supra, at 90.

This result flows from the well established constitutional and statutory principle that the President's power of removal of executive officers is incident to the power of appointment. Myers v. United States, 272 U.S. 52, 119 (1926). Although Congress can validly restrict and condition the President's removal power as to other than purely executive officers (such as the Comptroller General) by fixing standards for its exercise, Congress cannot assimilate completely the executive power of removal. Humphrey's Executor v. United States, 295 U.S. 602 (1935). Since Congress cannot vest entirely within itself "the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so," it cannot similarly reserve for itself the executive power of removal which is incident to the power of appointment. Buckley v. Valeo, *supra*, at 135. Since the President is given appointment power, it is not apparent how removal in any other hands can be reconciled with the doctrine that the latter is incident to the former.

Furthermore, this grant of power to Congress must be read in conjunction with the reasonable powers exercised by the other two branches. The President should have removal power over the Comptroller General because this power can only contribute, whether exercised or not, to the effective financial administration of the United States government. It would be unreasonable to completely prohibit executive removal of an officer with such broad financial powers and jurisdiction, and whose functions include many of a purely executive character. See, H. Mansfield, The Comptroller General, *supra*, 79-84.

II. THE SEPARATION OF POWERS DOCTRINE IS NOT VIOLATED BY THE COMPTROLLER GENERAL'S AUTHORITY UNDER TITLE VII.

The separation of powers doctrine was originally based on the concept that all powers of government are divided into three distinct branches, executive, legislative and judicial, and that one branch cannot be permitted to encroach upon the powers of another. The Supreme Court has recognized that the doctrine no longer contemplates complete separation of the branches of government because such "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Buckley v. Valeo, *supra*, 424 U.S. at 121. Thus, the Supreme Court's pragmatic interpretation of the doctrine is based on the reality that governmental powers are shared and that

"enforcement of a rigid conception of separation of powers would make modern government impossible." Atkins v. United States, Ct. Cl. Nos. 41, 132, 357-76 at 64 n. 32 (May 18, 1977). Accord, Nixon v. Administrator of General Services, 45 U.S.L.W. 4917, 4921-2 (June 28, 1977). Justice Jackson summarized this understanding as follows in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952):

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

In accord with the Supreme Court's practical application of the doctrine, the separation of powers principle does not apply to the operations of an agency which has been vested with a combination of executive and legislative powers by the Congress since the theoretical and doctrinal concept of separation of powers does not stand up when faced with the practical necessities of effective government. K. Davis, Administrative Law of the Seventies, §§1.09 and 1.09-1 (1976). The doctrine has not been applied, for example, to administrative agencies such as the Federal Aviation Administration and the Veterans Administration because it would appear to render the existence of such typical agencies unconstitutional. Similarly, the combination of powers given the Comptroller must also be regarded as constitutional. As Professor Mansfield states, the "very purpose in creating most administrative agencies [and the GAO] is to effect a combination of legislative, executive, and judicial authority sufficient to accomplish pressing social tasks, but a combination that will preserve ultimate controls in all these constitutional branches." H. Mansfield, The Comptroller General, *supra*, at 89. Professor Mansfield further states that it would be a perversion of the doctrine to forbid any combination of administrative powers. *Id.*

Professor Davis explained the rationale for not applying the separation of powers doctrine to administrative agencies as follows:

"What we have discovered in facing such problems -- and we have by now had a good

deal of experience -- is that the true principle that should guide the allocation of power within the general framework is not the principle of separation of the three kinds of power but is the principle of check.

The danger is not blended power. The danger is unchecked power.

In the organic arrangements that we have been making in recent decades in the establishment and control of administrative agencies, the principle that has guided us is the principle of check, not the principle of separation of powers. We have had little or no concern for avoiding a mixture of three or more kinds of powers in the same agency; we have had much concern for avoiding or minimizing unchecked power But we have taken pains to see that the agencies report to and draw their funds from our legislative bodies, that the personnel of the agencies are appointed and reappointed by the executive, and that the residual power of check remains in the judiciary. As long as we continue to emphasize the principle of check, we may safely continue our increasingly deep-seated habit of allowing the blending of three or more kinds of power in the same agency. Davis, Administrative Law Treatise, §1.09 at 68-9 (1958).

Even if the Comptroller General were viewed solely as a legislative officer or agent of Congress, the separation of powers doctrine would not appear to be violated by his deciding bid protests. One recent commentator explained that the Comptroller General, as a legislative officer, would not be infringing upon executive functions because:

"...as a factual matter the GAO clearly acts as an independent agency in its accounts settlement role, however that role be characterized. Thus, even if the GAO's account settlement is an executive function, the GAO does not perform it as an

arm of Congress, but rather as an independent office of the Government. This is what, in my opinion, was intended by the 1921 Act and is what exists today -- an independent office to perform the account settlement function. Thus one cannot reasonably argue that an agent of Congress is performing an executive function." T. Williamson, Bid Protests and the Procurement Commission, 9 Public Contract Newsletter 1, 5 (October, 1973).

Furthermore, the Court of Claims, in Atkins v. United States, supra, at 66-67, recently established that there is no separation of powers problem when an executive officer "acts as . . . agent of the legislative branch of the Government." Thus, even if the Comptroller General would be acting as a legislative officer in the limited area of bid protest decisions, his status as a member of the Executive Branch in his other functions renders the separation of powers objection irrelevant since Atkins appears to enable him to act as "an agent of the legislative branch" in this limited fashion without violating the separation of powers doctrine.

Thank you again for the opportunity of expressing our views.

Respectfully submitted,

Roy S. Mitchell

Roy S. Mitchell
Chairman

RSM/jl

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Text

DEPARTMENT OF JUSTICE VIEWS ON CONSTITUTIONALITY OF COMPETITION, BID PROTEST PROVISIONS ENACTED BY CONGRESS

Honorable Jack Brooks
Chairman
Committee of Government Operations
House of Representatives
Washington, D.C. 20515
Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 5184, a bill "to revise the procedures for soliciting and evaluating bids and proposals for government contracts using full and open competition, and for other purposes." The Department of Justice opposes enactment of this legislation.

While we join other federal agencies in a commitment to full and open competition where feasible, we believe that section 204, providing for review of procurement procedures by the General Accounting Office, may give rise to substantial constitutional problems in that it abridges the doctrine of separation of powers. Additionally, the provisions of section 204 establish a procedure that permits unnecessary and unwise intrusion into the activities of the executive branch of the government by the legislative branch.

We believe that §204, which would authorize the General Accounting Office (GAO) to take a formal role in the awarding of contracts by the Executive Branch, raises novel and substantial constitutional issues. The GAO is an instrumentality "independent of the executive branch," 31 U.S.C. §702(a), and the Comptroller General is properly considered to be an officer of the Legislative Branch.¹ As such, he cannot exercise executive or judicial authority without violating the doctrine of separation of powers. *Buckley v. Valeo*, 424 U.S. 1, 139 (1976).

First, §204(b)(1) authorizes referrals from federal courts, in apparent violation of both Article I and Article III of the Constitution. It is not clear at what stage in a judicial proceeding the court would make the referral or whether GAO's recommendation would be an advisory opinion to the court or a final opinion to the parties. In either case, it would appear that GAO would be operating as some kind of adjunct to the judiciary. We are not aware of any authority in the Constitution that permits the Legislative Branch to provide advisory opinions to the Judicial Branch regarding pending cases. Article I authorizes the Legislative Branch to make laws, not to interpret them after they have been enacted. That task is given, under Article III, to the Judicial Branch. Thus, even if judges were inclined to ask for assistance, we believe that it would be unconstitutional for the Legislative Branch to provide it. It would raise equally serious problems under Article III if this section were read to permit GAO to render a final opinion to the parties, thereby usurping the judiciary's function. We therefore oppose the references to "any court of the United States" in §204(b)(1), and urge its deletion.

Second, §204(b)(2) provides for a stay of the award or performance of a contract pending review by the Comptroller General. While the Comptroller General ultimately makes only a "recommendation,"² the impact on the award of contracts by the Executive Branch will be immediate and profound.³ Only in the most exceptional circumstances can the contract be protected from any delay. §204(b)(2)(D), and even the "express option," §204(c)(1), will take about forty-five days. For the vast majority of contracts, therefore, there will be no statutory limit on the time that GAO may take to make its recommendations.⁴

We believe that this provision is unconstitutional. It is one thing to say that Congress may require the Executive to "report" contemplated Executive actions to its committees and delay their execution for a period during which those committees may consider legislation to block the Executive action, and quite another to say that Congress may delegate to an entity such as GAO the power effectively to block Executive action outside the legislative process.

Furthermore, if the system ultimately established by this provision sets a 45-day limit during which the Executive Branch could take no final action on a contract, it would constitute more than a "report and wait" provision. It would be unconstitutional because the GAO's action on the contract prior to the end of the 45-day period would, by assertedly permitting the agency to proceed at that point, be taking an action having a legal effect on the rights and obligations of persons outside the Legislative Branch, a result clearly foreclosed by the Supreme Court in *INS v. Chadha*, 103 S.Ct. 2764 (1983). More importantly, §204(b)(2) clearly contemplates the possibility that with respect to some contracts, the agency will simply be put on permanent "hold" until after GAO has announced its "recommendation." Thus, rather than confronting a statutorily imposed 45-day "waiting period," the agency would be confronted with what would be, analytically, nothing less than a clearly unconstitutional "committee approval" provision, the only difference being that the GAO would play the pivotal role rather than a congressional committee. This section must be deleted because of this constitutional infirmity.

Third, §204(c)(4) purports to give the Comptroller General the authority to make a ruling granting a party the costs of its protest, including attorney fees, which "shall be paid promptly by the executive agency concerned out of funds

¹ GAO has for many years issued similar "recommendations" to agencies, 4 C.F.R. Part 21, but it has done so without any express statutory authorization, relying instead on an extension of its authority to settle the accounts of the Government, 31 U.S.C. §3702. Given that there has been considerable discussion over the years questioning whether this settlement authority is properly lodged in a legislative body like GAO, rather than in an executive agency, this bill may be an attempt to give the program a firmer footing.

² Given the thousands of contracts awarded each year by the Executive Branch, it may be that the delay engendered by this new process will seriously impinge on the Executive Branch's ability to execute the laws in a timely fashion.

³ The Comptroller General is supposed to be the "maximum extent practicable," to set up as "inexpensive and expeditious process." H.R. 5184, §204(c)(1).

⁴ See generally Willoughby, *The General Accounting Office* 12 (1977); Smith, *The General Accounting Office* 61 (1977); *The United States Government Manual* 42 (1983).

available for the purpose of the procurement concerned." (Emphasis added). Whether this authority is analyzed as GAO's performing a judicial function which is binding on an executive agency, or as GAO's rendering an administrative decision for the Executive Branch, it is clearly unconstitutional. *Buckley v. Valeo*, 434 U.S. 1 (1977). The doctrine of separation of powers does not, except in certain very limited circumstances,¹ permit the legislature or any of its parts to bind the Executive Branch except by passage of a law. Nor does it permit the Legislative Branch to exercise the law by determining how contracts should be awarded or to adjudicate claims against the Executive Branch. Accordingly, section 204(c)(4) must be deleted in order to remove this substantial concern.

Furthermore, in our view, awarding attorney fees in every case in which the protester prevails is unwise. First, it is contrary to the American rule that attorney fees are not shifted to the losing party, but are borne by each party. While the American rule evinces a shifting of fees in the event of bad faith, no such requirement is made by this proposed legislation. Even the Equal Access to Justice Act, legislation which abrogates the American rule and makes attorney fees against the Government available, requires that the private party demonstrate that the Government's position was not "substantially justified." At a minimum, the legislation should require such a showing.

In addition, the availability of attorney fees in proceedings before the General Accounting Office will undoubtedly encourage litigation which would not otherwise be instituted. The courts have long recognized the wisdom of allowing executive agencies wide latitude in exercising their discretion in procurement situations. The provision for attorney fees seems destined to encourage baseless attacks on the exercise of this discretion.

Apart from the constitutional infirmities evident in section 204, it appears to be intended to create an even greater limit on the traditional broad discretion of executive agencies to conduct procurement activities than is now in existence. We see no reason for legislation with such a goal.

Both before and after contract award, bidders now have the right to institute suit, in either the United States Claims Court or the United States district courts, to seek an injunction preventing the procuring agency from taking further action. In the event a less binding (and perhaps less costly) resolution to such a dispute is desired, bidders now have the right to institute an action before the General Accounting Office which can recommend that the agency take a different course of action. To the extent that the legislation creates for bidders additional substantive rights in the nature of greater competition or fuller agency disclosure, such rights may be enforced under the present law.

Perhaps the most significant intrusion into the procurement process is the bill's provisions affording rights of action before the GAO, before the General Services Board of Contract Appeals and before the courts under the Administrative Procedure Act, to "any interested party." We strongly believe that it would not be in the public interest to allow "any interested party" to disrupt, and possibly halt, a federal procurement of needed goods or services. While the bill does not amplify the meaning of "any interested party," we assume it to include parties other than bidders. In this regard, the bill is a radical departure from existing law, established through a number of years of judicial and administrative experience, which provides that only bidders

may cause the substantial disruption to the federal procurement process that attends the filing of a challenge to the agency's action. This law was developed for very good reasons. The interruption of normal executive branch functions and the cost to the taxpayer of bid protest litigation cannot be overstated. The courts have consistently recognized the need for substantial discretion in agency officials in the procurement process. All of these considerations have led to the recognition that bid protest have a profound deleterious effect on procurement policy and therefore should be permitted only when the protester has the interest in the procurement of a bidder. Allowing "any interested party" to file an action which, except in unusual circumstances, would require the agency to delay the procurement pending action by the Comptroller General would not be in the best interests of the American people.

Section 204(e), which provides for review of agency procurement decisions under the Administrative Procedure Act, is unnecessary and largely duplicative of the remedies available under the Federal Courts Improvement Act, passed by Congress less than 3 years ago. That Act gave the United States Claims Court jurisdiction to entertain suits for injunctive and other relief filed by bidders who challenge a procurement prior to award. The district courts continue to entertain such suits when they are filed after award. Therefore, providing for APA review is unnecessary and may result in inconsistent legal standards while fostering more litigation.

Section 204(f), providing for jurisdiction in the General Services Board of Contract Appeals over challenges to procurement to procurements of automatic data processing equipment, creates a patchwork of remedies benefitting no one. It would create a fourth forum in which a bidder could challenge such a procurement by adding jurisdiction in the Board of Contract Appeals to the previously existing jurisdiction in the Claims Court, the district courts and the General Accounting Office. We know of no reason to enact a law which shows such potential for confusion and disruption absent a compelling need for a fourth forum.

Finally, section 204(b)(2)(A) requires executive agencies to "submit a complete report (including all relevant documents) on the protested procurement to the Comptroller General within twenty-five working days from the agency's receipt of the notice of such protest."

This resembles prior proposals, historically opposed by this Department, that were intended to give the General Accounting Office unlimited access to executive branch records.² They were opposed because they made no provision for protection of sensitive information from either domestic or foreign activities. Any legislation in this area should permit either the President or the head of the affected agency to exempt records involving financial transactions which relate to sensitive foreign intelligence or foreign counter-intelligence activities; financial transactions taken pursuant to section 8(b) of the Central Intelligence Agency Act of 1949, as amended; and information the disclosure of which could reasonably be expected to expose a sensitive investigation or investigative technique, or endanger the safety of past or present government agents, informants, other coop-

¹ *INS v. Chadha*, 103 S.Ct. 3764, 3784 n.20 (1983).

² See Letter to the Honorable Jack Brooks, Chairman, House Committee on Government Operations, from Benjamin R. Civiletti, Deputy Attorney General, July 9, 1979 (H.R. 34); Statement of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, Before the House Subcommittee on Legislation and National Security, Committee on Government Operations, June 18, 1978 (H.R. 13171).

erating individuals or their families. See, e.g., 31 U.S.C. §3634(c), (d) (1963).

In sum, we believe that section 304 is unconstitutional, unnecessary and potentially damaging to the interests of the United States. In the event that Congress determines that, in an effort to foster more competition, agencies should follow certain procedures to accomplish that end, adequate remedies to ensure compliance are presently available.

The Office of Management and Budget has advised this Department that there is no objection to the submission of

this report from the standpoint of the Administration program.

Sincerely,

Robert A. McConnell
Assistant Attorney General

C. Marshall Cain
Acting Assistant Attorney General
Pursuant to 28 C.F.R. §0.123

**Office of the Attorney General****Washington, D.C. 20530****November 21, 1984**

Honorable George Bush
President of the Senate
United States Senate
Washington, D.C. 20510

Dear Mr. President:

Section 203(a) of Pub. L. No. 98-411, 98 Stat. 1545, by continuing the authorities contained in § 21 of Pub. L. No. 96-132, 93 Stat. 1049-50, requires that the Attorney General "transmit a report to each House of the Congress" in any case in which the Attorney General "determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional." This letter is submitted consistent with the notification requirement contained under Pub. L. No. 98-411.

Specifically, this letter concerns the Department's decision that federal agencies should not execute certain bid protest provisions of the Competition in Contracting Act of 1984 ("CICA" or "the Act"), which was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984). The first provision requires a procuring agency to suspend or "stay" any procurement if a bid protest is filed prior to the award of a contract or within ten days after the award. The provision then purports to authorize the Comptroller General to lift this "stay" of the procurement by issuing his decision on the bid protest. See revised 31 U.S.C. § 3553(c) and (d). The second provision purports to authorize the Comptroller General to make binding awards of attorneys' fees and bid preparation costs to successful bid protesters. See revised 31 U.S.C. § 3554(c).

The Department of Justice commented on and objected to the constitutionality of similar bid protest provisions when they were under consideration by Congress as part of H.R. 5184. See Letter to Honorable Jack Brooks, Chairman, House Committee on Government Operations, from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (April 20, 1984). When these provisions were subsequently adopted by Congress as part of the Deficit Reduction Act, the President noted in a signing statement his constitutional objections to these provisions and requested the Department of Justice to inform Executive Branch agencies how they might comply with the Act in a manner consistent with the Constitution. See 20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984). Subsequently, the Office of Legal Counsel advised me that these provisions were inconsistent with the constitutionally prescribed separation of powers and should not be executed. See Memorandum for the Attorney General, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, re: Implementation of the Bid Protest Provisions of the Competition in Contracting Act (October 17, 1984). I directed that the Office of Legal Counsel memorandum be transmitted to the Executive Branch agencies responsible for implementing the provisions of the CICA to provide them with the guidance requested by the President.

For the reasons set forth below, I have reached the conclusion that these specific provisions of the CICA are unconstitutional and should not be executed. I have accordingly determined that the Department of Justice will refrain from defending these specific provisions of the CICA in any court, administrative or other proceeding in which execution of the provisions is sought.

The Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921. See 42 Stat. 23 (1921). The Budget and Accounting Act expressly stated that the Comptroller General is "independent of the executive departments" Id. Subsequent legislation made it clear that the Comptroller General is part of the Legislative Branch. The Reorganization Act of 1945 specified that, for the purpose of that Act, the term "agency" meant any executive department, commission, independent establishment, or government corporation, but did "not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." 59 Stat. 616 (1945). The same provision was included in the Reorganization Act of 1949. See 63 Stat. 205 (1949). The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General "as an agent of the Congress" 64 Stat. 835 (1950).

Although the President nominates and, with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General, even for cause. See 31 U.S.C. § 703 (1982). The Comptroller General is appointed for a fifteen-year term, but he may be removed either by impeachment or by a joint resolution of Congress, after notice and an opportunity for hearing, for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1). Given the breadth of the grounds of removal, particularly the terms "inefficiency" and "neglect of duty," Congress enjoys a relatively unlimited power over the tenure in office of the Comptroller General. 1/

Congress expected this broad power of removal to give it the right effectively to control the Comptroller General. The chief House manager of the Budget and Accounting Act stated with respect to the new position of Comptroller General:

This officer is to be the arm of Congress. When he fails to do that work in a strong and efficient way, in a way that Congress would have the law executed, Congress has its remedy, and it can reach out and say if the man is not doing his duty, if he is inefficient or guilty of any of these other things, he can be removed.

61 Cong. Rec. 1080 (1921) (remarks of Rep. Good).

Thus, the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees.

1/ The Supreme Court has recognized that the power to remove an official is necessarily linked to the power to supervise and control the actions of that official. See Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935).

The Supreme Court has most recently and thoroughly considered the scope of Congress's authority to act through its agents in INS v. Chadha, 103 S. Ct. 2764 (1983). In Chadha, the Court declared unconstitutional a one-house legislative veto provision. In so doing, the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto:

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.

103 S. Ct. at 2782. When Congress takes action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," it must act by passing a law and submitting it to the President in accordance with the Presentment Clauses and the constitutionally prescribed separation of powers. Id. at 2784 (emphasis added). The Court emphasized that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." Id. at 2786. 2/

2/ As the Court noted, there are only four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto: the power of the House of Representatives to initiate impeachment, the power of the Senate to try individuals who have been impeached by the House; the power of the Senate to approve or disapprove presidential appointments; and the power of the Senate to ratify treaties negotiated by the President. See 103 S. Ct. at 2786.

Finally, with respect to Congress's power over the Legislative Branch, the Court concluded:

One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Id. at 2786 n.20 (emphasis added).

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional role of the Comptroller General, it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, and he may not take actions that bind individuals and institutions outside the Legislative Branch. He may advise and assist Congress in reviewing the performance of the Executive Branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States. Our analysis of the bid protest provisions of the CICA is based upon these conclusions.

Under the stay provision of the CICA, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision on a bid protest. As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest.

From a constitutional perspective, we find nothing improper in the requirement for a stay, in and of itself. Congress frequently requires Executive Branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so-called "report and wait" requirements were specifically recognized by the Supreme Court in Chadha as a constitutionally acceptable alternative to the legislative veto. See 103 S. Ct. at 2783.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. The CICA gives the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed. This authority amounts, in Chadha's words, to a power that has the "effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." See 103 S. Ct. at 2784. As a constitutional matter, there is very little difference between this power and the power of a legislative veto.

A difficult problem is presented in this instance, however, by the question of the extent to which the unconstitutional provision is severable from the remainder of the CICA. In Chadha, the Court ruled that an unconstitutional provision is generally presumed to be severable. The Court outlined several guidelines with respect to evaluating this issue in a specific instance. First, the Court stated:

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." Buckley v. Valeo, 424 U.S. 1, 108 . . . (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 . . . (1932).

INS v. Chadha, 103 S. Ct. at 2774. Thus, unless there are clear indications that Congress would have intended additional parts of a statute to fall because of the invalidity of a single provision, the invalid provision will be severed. Second, the Court stated that a severability clause is strong evidence that Congress did not intend that the entire statute or any other part of it would fall simply because another provision was unconstitutional. 103 S. Ct. at 2775. Finally, the Court stated that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.'" Champlin Refining Co. v. Corporation Comm'n, *supra*, 286 U.S. at 234." 103 S. Ct. at 2775. The severability issue must be analyzed in light of these principles.

The only aspect of the stay provision that is directly unconstitutional is the provision authorizing the Comptroller General to lift the stay by issuing his decision or finding that a particular protest is frivolous. If this provision alone were severed, the stay would remain in effect indefinitely because there would be no remaining statutory basis for terminating the stay. Although the statute could technically operate this way, as a practical matter this alternative would seem quite draconian because it would permit any bid protester effectively to cancel a procurement simply by filing a protest. It is clear that Congress did not intend such a result when it adopted the CICA. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984).

Alternatively, the stay provisions could be interpreted to require a mandatory stay for a set period of time in order to give the Comptroller General an opportunity to reach a decision on the bid protest. This period of time might be set at 90 working days, which is the period of time established by the CICA as the standard time within which the Comptroller General should issue his decision on a bid protest.

We do not believe, however, that such a reworking of the statute would be consistent with Congress's intent. First, such a construction would involve essentially a redrafting of the stay provision rather than simple severance of the offending sections. Second, and more important, it would mean that any time a bid protest were filed, a procurement would automatically be delayed for 90 working days. Thus, any interested party who might be able to file a protest, however ill-founded, could prevent a procurement for a not insubstantial period of time.

We do not believe that Congress intended the bid protest process to be subject to such potential manipulation. In fact, Congress expressly included the provision granting the Comptroller General the power to dismiss frivolous protests precisely in order to avoid this potential abuse. The conference report stated:

The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a solid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from

(cont'd)

(cont'd)

being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984). Given our conclusion that the provision permitting the Comptroller General to terminate the stay immediately in the case of a frivolous protest is unconstitutional, we do not believe that Congress would have intended for all contracts to be delayed for any set period of time simply upon the filing of a protest, regardless of the good faith of the protester or merit of the protest. Therefore, because the provisions permitting the Comptroller General to terminate the stay must be severed from the statute, we believe that the entire stay provision must be stricken as well. 3/

The provision permitting the Comptroller General to award costs, including attorneys' fees and bid preparation costs, to a prevailing protester, and which purports to require federal agencies to pay such awards "promptly," 31 U.S.C. § 3554(c)(2), suffers from a constitutional infirmity similar to the one that afflicts the stay provision. By purporting to vest in the Comptroller General the power to award damages against an Executive Branch agency, Congress has attempted to give its agent the authority to alter "the legal rights, duties and relations of persons . . . outside the legislative branch." 103 S. Ct. at 2784. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise judicial authority than it may exercise executive authority. See INS v. Chadha, 103 S. Ct. at 2788 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, see Humphrey's Executor v. United States, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

3/ We have no doubt that, under the severability principles set forth above, the stay provision may be severed. The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated.

Based on the foregoing discussion of the law of severability, we believe that the damages provision is clearly severable from the remainder of the CICA. The remainder of the Act is unrelated to the damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute.

We wish to emphasize that we do not question the validity of the remainder of the CICA, and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain Executive Branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch.

My position concerning the execution of these provisions is consistent with the historic practice of the Department of Justice. Although the Department will, in general, defend the constitutionality of a statute that has been challenged in litigation, there are certain rare instances in which it will refrain from that defense or will determine that the statute should not be enforced. In a letter to Senators Thurmond and Biden, dated April 6, 1981, I reiterated this pre-existing policy:

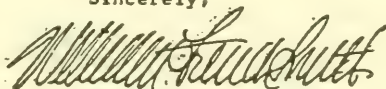
The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.

I believe that the specific provisions of the CICA to which this Department has objected fall within both of these narrow categories. First, the unconstitutional provisions tread upon Executive Branch prerogatives by granting to the Legislative Branch power that is inconsistent with its constitutional mandate. Second, I believe that this conclusion with respect to the constitutionality of these provisions is indisputable in light of the Supreme Court's decision in INS v. Chadha, 462 U.S. 919 (1983).

In addition, the Department's decision to advise Executive Branch agencies not to execute the unconstitutional provisions will best assure a rapid and definitive judicial resolution of these constitutional issues. Any bid protester who is aggrieved by an Executive agency's failure to comply with these provisions may raise the constitutional issues for judicial resolution. On the other hand, it is doubtful that anyone would have standing to raise these constitutional issues if the Executive Branch fully executed the subject provisions.

Therefore, I believe that the action I am taking is consistent with my responsibility to support and defend the Constitution and at the same time will facilitate prompt judicial consideration of the constitutional issues.

Sincerely,



William French Smith
Attorney General

Mr. BROOKS. Thank you very much for a fine statement and for your contribution to this hearing.

We will hear from Mr. Coburn now, then we will have a question for both of you.

**STATEMENT OF GEORGE M. COBURN, COUNSEL, SACHS,
GREENEBAUM & TAYLER, WASHINGTON, DC**

Mr. COBURN. Mr. Chairman, members of the subcommittee, I will be very brief.

This action of nullification of CICA by the executive branch has a devastating impact on procurement and the goals of this Congress in enhancing competition in Federal procurement.

The statute so far as the ability of bidders to enforce executive compliance with this law is a dead letter so long as the position of the executive branch in nullifying the central provisions of the protest system remain effective.

My formal statement shows why, in my opinion, the position of the Justice Department badly misreads the statute, why the actions of Mr. Stockman and the top procurement officials of the executive branch are unconstitutional in nullifying the protest provisions.

I then suggest that the impact, why the impact on the procurement community is devastating and it is as if this new statute never became law so far as the ability of bidders to enforce compliance with it is concerned through the GAO protest remedy; and finally I suggest some actions that Congress may take short of awaiting the results of a judicial proceeding, primarily through oversight hearings such as this, and before the authorization and appropriations committees may well persuade the executive branch the error of their ways, and persuade them to come in compliance with this law.

My main point, Mr. Chairman and members of the subcommittee, is that this is an unprecedented nullification of the laws of Congress which have mandatory application on the executive branch; and something has to be done about it—and soon, if this Congress is to preserve our system of government, and if the goals of this new and important procurement statute as well as certain others that Congress enacted the last months of the 98th Congress are to achieve the intended benefits, primarily to overcome the undue concentration of Government procurement in a score of companies to the detriment of the public interest.

Thank you, Mr. Chairman.

[Mr. Coburn's prepared statement follows:]

STATEMENT OF

GEORGE M. COBURN

Mr. Chairman and Members of the Subcommittee:

My name is George M. Coburn. I am a former chairman, 1978-79, of the Section of Public Contract Law, American Bar Association. I have practiced government contract law since 1949, first as an attorney with the Navy Office of the General Counsel, and since 1962 in private practice. I am presently Counsel to Sachs, Greenebaum & Tayler, Washington, D.C.

I am here today as a private citizen and very much appreciate this opportunity to express my strong support for the Competition in Contracting Act of 1984 and particularly for the GAO procurement protest system established by that act, and to express my deep disappointment at the recent actions of the Executive Branch in refusing to execute the central provisions of this statutory protest system. I shall briefly address these concerns: (1) the major errors in the position of the Department of Justice; (2) the unconstitutional refusal of the Executive Branch to execute the stay of contract award and performance and award of cost provisions of the CICA; (3) the adverse impact of the foregoing on government contractors; and (4) action that Congress might take to resolve these matters.

The Major Errors in the Department of Justice Memorandum

In a memorandum for the Attorney General dated October 17,

1984,^{1/} the Acting Assistant Attorney General, Office of Legal Counsel, concluded that the stay of contract award and performance provisions of the Competition in Contracting Act and enacted as 31 U.S.C. § 3553(c) and (d), together with the award of costs to prevailing protesters enacted as 31 U.S.C. § 3554(c), are unconstitutional for delegating executive and judicial functions to the Comptroller General as an agent of Congress and should therefore be disregarded by Executive Branch agencies in responding to bid protests filed with the Comptroller General. And, further, by a letter to Senator Cohen dated November 21, 1984, Attorney General Smith essentially concurred in the opinion and the conclusion of the Office of Legal Counsel.^{2/}

In so concluding, the memorandum of the Office of Legal Counsel interpreted the authority vested in the Comptroller General by 31 U.S.C. § 3554(a) to decide protests within 90 working days (or within 45 calendar days under an express option) as "the power to determine when the stay^{3/} will be lifted by the issuance of his decision on a bid protest," thus unconstitutionally giving "the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed."^{4/}

^{1/} The Bureau of National Affairs, Inc., 42 Federal Contracts Report (FCR) 755 (10/29/84).

^{2/} 42 FCR 937 (12/3/84).

^{3/} 31 U.S.C. § 3553(c) and (d) require that contract award or contract performance be stayed pending the Comptroller General's decision on the bid protest, unless the head of the procuring activity makes certain findings authorizing contract award or contract performance. The Office of Legal Counsel found nothing constitutionally "improper in the requirement for a stay, in and of itself." 42 FCR 760.

^{4/} 42 FCR 760.

I put to one side the important question of whether the Comptroller General in deciding bid protests, as in settling the Government's accounts under 31 U.S.C. § 3526, acts as an agent of Congress or as the head of an independent establishment in the Executive Branch.^{5/} On this point, I concur with the views of the American Bar Association as set forth in the testimony of Mrs. Williams at this hearing. Assuming, nevertheless, for purposes of discussion that the Office of Legal Counsel and the Attorney General are correct in asserting that the Comptroller General in the bid protest function acts as an agent of Congress, I suggest that it is sheer hyperbole for the Office of Legal Counsel to base its claim of separation of powers breach by the timing of the Comptroller General's decision on the assertion that the Competition in Contracting Act gives the Comptroller General "the power to dictate when a procurement may proceed."

That Congress did no such thing is entirely plain from the statute. First, 31 U.S.C. § 3553(c)(2) and (d)(2) unequivocally authorize the "head of the procuring activity responsible for award of a contract"--an official usually well below the level of the agency head--to make a written finding "that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General," so as to authorize contract award or contract performance,

^{5/} As distinguished, for example, from the function of auditing the accounts of executive agencies which Congress in 1950 declared the Comptroller General performs "as an agent of the Congress." 64 Stat. 835 (1960).

thus lifting the stay of contract award or contract performance mandatorily imposed by the filing of a bid protest under the stay provisions of 31 U.S.C. § 3553(c)(1) and (d)(1). In addition, the stay of contract award may be lifted at any time after the filing of the protest by this subordinate agency official so long as contract award "is otherwise likely to occur within 30 days" after such a finding and the Comptroller General is first notified of the finding. Further, the stay of contract performance may be lifted at any time after the timely filing of a post-award protest upon such a finding by this subordinate agency official or should he instead find "that performance of the contract is in the best interests of the United States," and again after first notifying the Comptroller General of the particular finding.

Second, far from "the power to dictate when a procurement may proceed," the statute directs that the Comptroller General "shall issue a final decision concerning a protest within 90 working days from the date the protest is submitted to the Comptroller General unless the Comptroller General determines and states in writing the reasons that the specific circumstances of the protest require a longer period."^{6/} In addition, the Comptroller General is directed to "establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 45 calendar days from the date the protest is submitted,"^{7/} and to "dismiss a protest that the Comptroller General

^{6/} 31 U.S.C. § 3554(a)(1).

^{7/} 31 U.S.C. § 3554(a)(2).

determines is frivolous or which, on its face, does not state a valid basis for protest."^{8/}

Third, rather than "the power to dictate when a procurement may proceed," the decision of the Comptroller General is in terms a "recommendation" to the Federal agency concerned,^{9/} coupled with the requirements that the head of the procuring activity report to the Comptroller General if the Federal agency has not fully implemented the Comptroller General's recommendation within 60 days^{10/} and that the Comptroller General report by January 31 of each year to Congress "each instance in which a Federal agency did not fully implement the Comptroller General's recommendations during "the preceding year."^{11/}

Neither the memorandum of the Office of Legal Counsel nor the letter of Attorney General Smith to Senator Cohen considers these several provisions of the Competition in Contracting Act in ascribing to the Comptroller General "the power to dictate when a procurement may proceed." From the above discussion of the statutory provisions, Congress cannot be said to have granted any such power to the Comptroller General. Rather the above provisions fully recognize that those executive agency officials responsible for ongoing procurement must retain the power to determine when contract awards and contract performance must go forward in the public interest notwithstanding a meritorious bid protest. For these

^{8/} 31 U.S.C. § 3554 (a) (3).

^{9/} 35 U.S.C. § 3554 (b).

^{10/} 35 U.S.C. § 3554 (e) (1).

^{11/} 31 U.S.C. § 3554 (e) (2).

reasons then, the memorandum of the Office of Legal Counsel and the letter of Attorney General Smith badly misread the statutory provisions involved and should be rejected by Congress and the Courts as clearly erroneous.

As to the further conclusion of the memorandum of the Office of Legal Counsel that the statutory provision for the award of costs to successful protestants has vested impermissible "judicial authority" in the Comptroller General as an agent of Congress,^{12/} the memorandum fails to establish that the Comptroller General in "declaring an appropriate interested party to be entitled" to such costs^{13/} which the Federal agency concerned is then required to pay promptly out of procurement funds available to it^{14/} would be acting as an agent of Congress. For none of the statutory references on which the memorandum relies require the Comptroller General to be an agent of Congress in performing this function.^{15/} Rather the function is analogous to his power to settle the accounts of the executive agencies under 31 U.S.C. § 3526, a power conferred by the Budget and Accounting Act of 1921^{16/} and as to which the Comptroller

^{12/} 42 FCR 762.

^{13/} 31 U.S.C. § 3554(c)(1).

^{14/} 31 U.S.C. § 3554(c)(2).

^{15/} The memorandum's citation of the Reorganization Acts of 1945 and 1949 fails to recognize that these Acts limited the declaring the Comptroller General and the General Accounting Office as "part of the legislative branch of the Government" to be "for the purpose" of those Acts. See 59 Stat. 616, 63 Stat. 205. The fact that the Accounting and Auditing Act of 1950 declared that auditing for the Government would be conducted by the Comptroller General "as an agent of Congress," 64 Stat. 835, does not mean that he performs all his functions in that category.

^{16/} 42 Stat. 23.

was to be "independent of the executive departments,"^{17/} thus leaving open the question as to whether or not he was to be independent of the President's direction and control as well. Moreover, there is not the slightest hint in the Competition in Contracting Act that Congress or its Committees would or could assert any control over the Comptroller General in deciding bid protests or declaring prevailing protesters to be entitled to recover costs.

Further, the memorandum and Attorney General Smith's letter overlook the significance of the fact that the Comptroller General under 31 U.S.C. § 3554(c)(1) does not "award" costs as claimed,^{18/} but instead makes a declaration of entitlement to such costs. Congress, not the Comptroller General, has separately directed the Federal agencies concerned, by 31 U.S.C. § 3554(c)(2), to pay these costs should the Comptroller General declare a protestant to be so entitled. This difference, I submit, undermines the characterization of the Comptroller General's so acting as an exercise of judicial power.

For all these reasons, I find the legal position of the Department of Justice as stated in the memorandum of the Office of Legal Counsel and in Attorney General Smith's letter to Senator Cohn to be unpersuasive and not worthy of acceptance by Congress or by the courts.

^{17/} Id. Indeed, the Budget and Accounting Act of 1921 nowhere stated that the Comptroller General was an agent of Congress.

^{18/} 42 FCR 762.

The Unconstitutional Refusal of the Refusal
of the Executive Branch to Execute the
Stay of Contract Award and Performance and
Award of Costs Provisions of the CICA

OMB Bulletin 85-8,^{19/} issued by Mr. Stockman early last month, directed that Federal agencies, with respect to the stay of contract award and performance provisions of CICA (31 U.S.C. § 3553(c) and (d)) and the award of costs provisions of CICA (31 U.S.C. § 3554(c)), that "Agencies shall take no action, including the issuance of regulations based on the invalid stay provisions of the Act."^{20/} Further, "with respect to the 'stay' provision, agencies shall proceed with the procurement process as though no such provisions were contained in the Act. Pursuant to the provisions of the Federal Acquisition Regulation, the agency may voluntarily agree to stay procurements pending the resolution of bid protests, but the grant of such a stay must be based on other valid authority and may not be based upon the invalid stay provisions of the Act."^{21/}

Mr. Stockman further directs that Federal agencies "shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs made by the Comptroller General."^{22/}

Thereafter on January 11, 1985, by Federal Acquisition Circular No. 84-6 issued by senior procurement officials of DoD, GSA and NASA, the Federal Acquisition Regulation was revised, effective January 15, 1985, to carry out Mr. Stockman's directive.^{23/}

^{19/} 43 FCR 55.

^{20/} Id. at 56 ¶ 3.

^{21/} Id.

^{22/} Id.

^{23/} 43 FCR 167.

FAR 33.104, dealing with protests to GAO, as so revised, states in part:

The Department of Justice has advised that the GAO stay provisions in 31 U.S.C. 3553(c) and (d) and the GAO damages provision in 31 U.S.C. 3554(c) regarding payment of costs of filing and pursuing a protest and preparing the bid and proposal are unconstitutional; therefore, they neither bind the executive branch nor serve as the basis for any coverage in this section.^{24/} (Emphasis added)

There can be no doubt that these directions to federal agencies not to execute these provisions of the CICA--indeed to nullify them--stem from the President's statement on signing H.R. 4170, the Deficit Reduction Act which included the CICA, that "I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch" and that accordingly "I am instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply with the provisions of this bill in a manner consistent with the Constitution."^{25/}

This action of the President and his subordinates in nullifying, by so refusing to execute, the indicated mandatory provisions of the CICA is probably in itself unconstitutional. As a first and fundamental principle of constitutional law, as declared

^{24/} Id.

^{25/} 42 FCR 756.

by Chief Justice John Marshall, "It is emphatically the province and duty of the judicial department to say what the law is."

Marbury v. Madison, 1 Cranch 137, 177 (1803), a holding that many decisions of the Supreme Court "have unequivocally reaffirmed," United States v. Nixon, 418 U.S. 683, 703-04 (1974), citing among other authorities Baker v. Carr, 369 U.S. 186, 211 (1962); Powell v. McCormack, 395 U.S. 486 (1969); and Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952). See also Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 411-13 (1970). The plain implication of these cases is that the President and his subordinates have no authority to refuse to execute or to nullify the laws of Congress on constitutional or other grounds; and the lower federal courts have recognized that it is not within the discretion of the Executive Branch to refuse to execute the laws passed by Congress. See, e.g., National Federation of Federal Employees, Local 1622 v. Brown, 645 F.2d 1017, 1025 (D.C. Cir. 1981); Olegario v. United States, 629 F.2d 204, 224 (2d Cir. 1980), cert.den., 450 U.S. 980; Commonwealth of Pennsylvania v. Lynn, 362 F. Supp. 1363, 1372 (D.D.C. 1973), rev'd on other grounds, 501 F.2d 848 (1974).

For these refusals to execute the laws Congress, on its own, has the power to cite the appropriate executive officials for contempt of Congress and the power to impeach.

I further suggest, however, that when the asserted basis of unconstitutionality of the statutory provisions at issue is as insubstantial and unpersuasive as I believe to be the case here, it may be that this hearing and others like it can have a positive

effect in persuading the executive branch officials concerned to come into compliance with the law.

In any case, there should be full awareness that Congress is facing, so far as I know, an unprecedented refusal by the Executive Branch to execute or comply with mandatory statutory provisions, a precedent which if allowed to stand could have the gravest implications for a system of government understood to be based on the rule of law.

The Adverse Impact on Government Contractors

The bid protest provisions of the CICA, both as to Brooks Act procurements with the alternative remedy in the GSBICA and for all procurements in the GAO, are a welcome and long overdue corrective to enforce competition in government contracting, particularly as the requirements for competition have been greatly strengthened and improved by the CICA, by the Small Business and Federal Procurement Competition Enhancement Act of 1984 (Pub. L. 98-577), by the Defense Procurement Reform Act of 1984 (Pub. L. 98-525), and by such further procurement reforms as Congress may yet enact to overcome the undue, noncompetitive concentration of government procurement in a score of large firms.

Before the Competition in Contracting Act, the effectiveness of the bid protest function in the GAO suffered from the following principal deficiencies:

1. On meritorious protests, the GAO ordinarily would afford no relief when the contract award had been made before or during the protest and when either the anticipated costs of

termination for convenience of the awarded contract would substantially increase the costs of the procurement or the procuring agency objected to delay in the procurement arising from such a termination or from a resolicitation of bids or proposals.

2. The procurement regulations failed to assure the obtaining of a GAO decision on the protest prior to contract award except in urgent and compelling circumstances and provided no protection for the bid protest remedy in post-award protests, which was the only means of protest for negotiated procurements. Instead, for preaward protests, the regulations permitted award to be made, if approved at a level above the contracting officer, whenever "the contracting officer determines that . . . (ii) delivery or performance will be unduly delayed by failure to make award promptly; or (iii) a prompt award will otherwise be advantageous to the Government."^{26/} Obviously under such permissive standards bid protests received short shrift; and for negotiated procurements, when the award had already been made, relief was rarely if ever available.

3. The time for GAO to decide protests was often unreasonably long, generally because of the inability of the GAO to compel timely responses from the procuring agencies on the protest.

4. The refusal of GAO to resolve disputed material facts coupled with its practice of ordinarily accepting the procuring agency's statement of the facts.

The Competition in Contracting Act, successfully in my opinion, resolves the first three of these deficiencies. As to

^{26/} FAR 14.407-8(b) (April 1, 1984)

them, the principal problem that remains, however, is that as the result of OMB Bulletin No. 85-8 and FAC No. 84-6 discussed above the stay of contract award and performance provisions of the CICA have been superseded by the new FAR regulations which permit the contracting officer or other designated official, in the case of a preaward protest to GAO, to make the award notwithstanding the protest upon a written determination that "(i) The supplies or services to be contracted for are urgently required; (ii) Delivery or performance will be unduly delayed by failure to make award promptly; or (iii) A prompt award will otherwise be advantageous to the Government."^{27/} As for protests to GAO after contract award, the FAR now states, in nullification of the CICA stay of contract performance provision, that "the contracting officer need not suspend contract performance . . . unless it appears likely that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest."^{28/}

Thus have the new procurement regulations nullified the stay of contract award and performance provisions of the CICA and perpetuated the first two basic deficiencies in the effectiveness of the GAO bid protest remedy. And by refusing to recognize the award of cost provisions for meritorious protests, the executive agencies have placed a further financial burden on those firms,

^{27/} FAR 33.104(b)(1), 43 FCR 170.

^{28/} FAR 33.104(c), 48 FCR 170.

particularly small business firms, that have meritorious complaints of having been denied a fair or equal opportunity to compete or of losing a contract award that was rightly theirs. For the principal advantage of the GAO as a protest forum is that it is the least costly alternative as compared with bid-protest litigation in the Claims Court or in the federal district courts.

The government contract business community, having welcomed the procurement reforms created so recently by Congress, can now only hope that the means of enforcement of these reforms through the greatly strengthened and more effective GAO bid-protest remedy enacted as a central element of the CICA will not continue to be denied to them through unilateral action of the Executive Branch, and that Congress will not permit this to happen.

Actions Congress Might Take To Resolve the Matter

The Executive Branch has thus precipitated, I believe, an unprecedented constitutional confrontation. It is likely that in due course a bidder will challenge in court the failure of the procuring agency to comply with the stay provisions after he has filed a timely protest with the GAO. Indeed, it is reported that such a case has recently been filed in the federal district court in Los Angeles.^{29/} For at present that is the only course open to disappointed bidders protesting to the GAO, to seek the injunctive power of the federal courts to enforce compliance with the stay provisions of the CICA.

^{29/} 43 FCR 319.

But what might Congress do to redress this constitutional breach short of exercising its powers of contempt and impeachment?

The power of persuasion of the Executive Branch through oversight hearings such as this should not be underestimated. Likewise the authorization and the appropriations committees have great power of persuasion when it comes to the procurement programs of the principal agencies of the Executive Branch and to the funding of those programs. It would seem that a determined effort in these respects could well persuade the Executive Branch to adopt procurement regulations that fully comply with the stay and the award of costs provisions of the CICA.

Beyond this, Congress could consider further legislation. For example, it could explicitly authorize the federal district courts to grant injunctions enforcing the stay provisions of the CICA without regard to meeting the usual requirements of law applied by the federal district courts for granting injunctive relief against the Government or its officers. Further, Congress could prohibit the expenditure of funds on any contract awarded in disregard of the stay provisions in the context of a timely protest to GAO under the CICA. Congress might even declare that for the purposes of performing his functions under the procurement protest system, the Comptroller General functions as the head of an agency independent of Congress, thus undermining the basis of the asserted claim of unconstitutionality. I make no recommendation as to any of these legislative alternatives. I simply suggest that they merit study should other approaches fail.

Mr. Chairman and members of the Subcommittee, Congress and this Subcommittee are to be congratulated for the splendid procurement reforms so recently enacted and including in particular the GAO procurement protest system. The public interest in the protection of our system of government as well as in effective procurement cannot permit that system to be nullified by these illegal actions of the Executive Branch. Thus we trust that Congress will meet its responsibilities.

That concludes my statement. I shall be happy to answer your questions.

Mr. BROOKS. How would you counselors respond to the assertions that the bid protest function results in unnecessary delays in agency procurements?

Ms. Williams?

Ms. WILLIAMS. Mr. Chairman, I would say that, based on my personal experience in the area of Government contracts, the bid protest function itself does not have a material effect in delaying the procurement process.

As you well know, procurement is a lengthy process that evolves over numbers of months—indeed, years—before an agency gets to the time of the actual award of a contract.

The bid protest function enables a contractor who feels that regulations or laws which require competition are adequately enforced. It seems to me a small price to pay to have the bid protest procedures go forward. Indeed, under the Competition in Contracting Act, an expedited procedure is available where within 45 days from the time of the protest, one can receive a decision.

In order to assure that competitive procedures are followed and adhered to, the bid protest function must be maintained. It is an important part—an integral part—of the process and not a hindrance to it.

Mr. COBURN. I concur with that, Mr. Chairman.

Mr. BROOKS. How would you respond to charges that the bid protest provisions of the Competition Act were hastily conceived and implemented into law?

Mr. COBURN. They were long overdue, Mr. Chairman, in my opinion.

They corrected some weaknesses in the existing procedures in that the GAO had no power to compel a timely response from the agency and, of course, the major deficiency from contractors' standpoint was that the award would very often be made while the protest was pending; and that would prevent the complaining party from getting any effective relief, most of the time.

Mr. BROOKS. Do you know that the matter had been studied extensively in Congress since the middle 1970's, and that Senator Chiles had introduced—

Mr. COBURN. Yes, sir.

Mr. BROOKS [continuing]. Legislation. Some of the language of Senator Chiles' legislation—the main thrust of it—was the basis of our final language.

Mr. COBURN. And we in the American Bar Association at that time, Mr. Chairman, strongly supported the enactment of those provisions.

Mr. BROOKS. Well, you know, Senator Chiles tried to pass it in the Senate where it was reported out of the Senate Governmental Affairs Committee, but was thwarted by, of course, the defense industry lobby and the Defense Department—there is a lot of difference, but not much.

Mr. COBURN. Yes, sir.

Mr. BROOKS. Do you agree with our earlier witnesses that the actions taken by the President, by the Justice Department and the OMB are improper?

Mr. COBURN. Totally.

Mr. BROOKS. And how do you feel about that, Ms. Williams?

Ms. WILLIAMS. Mr. Chairman, I am not authorized to comment on behalf of the ABA to that question.

Mr. BROOKS. You did not in your—

Mr. COBURN. That is because of the involved procedures of getting clearance of the highest levels of the American Bar Association.

Mr. BROOKS. How about your personal view? You have had a lot of experience—a whole lot of experience in contract matters. This was your basic expertise.

Ms. WILLIAMS. Thank you, Mr. Chairman.

My personal view is that the action is unlawful, illegal, and unprecedented. I must say, as someone who had the privilege of serving in the Office of Management and Budget, that the action taken by the administration runs right in the face of the obligation of the Office of Management and Budget to oversee expenditures of Federal dollars, and to work with the agencies in enforcing Federal statutes.

Personally, I find it very troubling that the chief legal officer of the United States would counsel the President and his officials to issue a directive that unilaterally declares a statute unconstitutional that was duly enacted by Congress and signed by the President.

Mr. BROOKS. I like your personal opinion. I don't care whether the ABA agrees or not.

In your view, what should the Congress do to force the executive to properly implement the statute.

Mr. COBURN. Mr. Chairman, I addressed that at some length in my statement.

Mr. BROOKS. Yes.

Mr. COBURN. I suggest that in hearings such as this—and before other committees—and particularly the appropriations and authorizations committee hearings of the Defense Department and of the Justice Department there is the means of strong persuasion in these committees to compel the reconsideration of the illegal executive position.

Mr. BROOKS. Well, you can be assured that I will participate in the Judiciary Committee authorization hearings for the Justice Department. I also will probably take that occasion to visit with some

of the members of the Appropriations Committee and bring it to their attention regarding this malfeasance of the Justice Department.

Mr. COBURN. I even suggest in my statement, Mr. Chairman, that if all else fails, this Congress could consider language that would deny the expenditure of funds of any contract as to which a protest of the GAO is disregarded by noncompliance with these provisions.

Mr. BROOKS. Interesting suggestion.

Mr. Horton?

Mr. HORTON. Mr. Chairman, I have some questions that I will submit to the witnesses and then they can put their answers in writing, if that will be agreeable.

Mr. BROOKS. Without objection.

Mr. HORTON. One thing I did want to just comment on, I guess. The thing that concerns me most about this whole thing is that, as I understand it, this is an unprecedented action by the administration. What I am concerned about is that it might be setting a precedent: "Well, now we have done it and that is what we should do in the future with a bill or any portion of a bill."

And that concerns me greatly; so I think that it is important that this matter be resolved. I hope that we can get the direct testimony of the Attorney General, and, of course, of the administrative officer, in this case, the Director of OMB, who carried out the order, so to speak, by issuing a directive that the law not be complied with.

I realize that it is not going to be on the front page tomorrow, but I think a very serious problem has been created by this action by the Justice Department, by the administration, in ruling that a provision of this bill that was duly passed and signed by the President into law is unconstitutional, and then in acting later on to tell the agencies not to comply.

Mr. COBURN. Mr. Chairman, Mr. Horton. This raises the most fundamental questions of our system of government, that the executive can take it upon itself to nullify an act of Congress.

And if that is permitted to be, to succeed, where will it end?

Mr. HORTON. It goes to the basic separation of powers.

Mr. BROOKS. The judicial system—you could have it all sent down to 1600 Pennsylvania.

Mr. HORTON. Absolutely. John Marshall said that——

Mr. BROOKS. You don't need a judicial system if the President and some appointed Attorney General are going to decide what is the law of this land.

Mr. HORTON. It overrules *Marbury v. Madison*.

Mr. BROOKS. What did John Marshall say?

Mr. COBURN. He said that in *Marbury v. Madison*.

Mr. BROOKS. Well, I want to thank both of you.

Mr. COBURN. Thank you.

Mr. BROOKS. You are gracious to come down here.

Mr. HORTON. Thank you.

Mr. COBURN. Thank you, Mr. Chairman.

Ms. WILLIAMS. Thank you, Mr. Chairman.

[Ms. Williams' submissions to Mr. Horton's questions follow:]

QUESTIONS OF MR. HORTON
FOR KAREN HASTIE WILLIAMS

Q1. EVEN WITHOUT EXECUTIVE BRANCH NON-COMPLIANCE, IT SEEMS CLEAR TO ME THAT THE JUSTICE DEPARTMENT'S ARGUMENT OVER CONSTITUTIONALITY WOULD BE LITIGATED IN DUE COURSE. THE ONLY DIFFERENCE IS THAT NOW, THE COMPLAINANTS WILL BE CONTRACTORS WHO HAVE FILED PROTESTS BUT FIND THE STAY PROVISION BEING IGNORED; WHEREAS, IF THE LAW WERE BEING UPHOLD, THE COMPLAINANTS WOULD BE CONTRACTORS WHO HAD A STAY IMPOSED ON THEM.

IN YOUR OPINION, COULD THAT DIFFERENCE AFFECT IN ANY WAY THE LENGTH OF TIME BEFORE THIS ISSUE MIGHT BE RESOLVED IN COURT?

A1. On balance I believe that judicial review of the constitutionality of the bid protest procedures of the Competition in Contracting Act (CICA) would have been accelerated by a decision of the Justice Department to fully uphold the law.

Under the current Justice Department posture only an aggrieved contractor who has filed a bid protest and found the stay being ignored can raise the constitutional issue. Under the alternative scenario complainants would be agencies/contractors who had a stay imposed on them.

The length of time before the issue is raised can thus be delayed by the fact that only the disappointed bidder can assert the challenge. At that point, the bidder learns that it has not been successful, has lost the award, cannot recover its bid preparation costs and generally is in no financial

position to pay for lawyers to protest the constitutionality of agency actions. There is little incentive to initiate legal proceedings given the low historical record of success among disappointed bidders at GAO or in the courts.

On the other hand, the Agency and the successful contractor have a greater incentive to seek to have the stay overturned so award can be made final, and performance can begin. They also can best assert the pro-competitive elements of the procurement process which would be at issue.

In litigation strategy the intangibles and contingencies, such as incentives, often contribute to the decision on when and whether to file suit. Based on the relative weight of incentives, it appears that the agency/successful contractor are more likely to join the issue quickly.

Q2. IN TESTIMONY PRESENTED LAST YEAR IN BEHALF OF THE ABA, YOUR SPOKESMAN EXPRESSED THE VIEW THAT THE EXISTING MECHANISM FOR RECOVERY OF COSTS BY A SUCCESSFUL CLAIMANT, ALREADY ESTABLISHED UNDER THE CONTRACTS DISPUTES ACT, WOULD BE ADAPTABLE TO THE BID PROTEST PROCESS AND WOULD BE PREFERABLE TO THE MECHANISM PROVIDED FOR IN CICA.

WERE CONSTITUTIONAL CONSIDERATIONS A FACTOR IN THAT PREFERENCE?

WHAT IS THAT MECHANISM, AND WHAT IS GAO'S PART IN IT?

A2. Under the Contracts Disputes Act (CDA) the recovery of costs provision, 41 U.S.C. § 612, was developed to meet the needs of the contractor community for prompt payment of claims.

The provision in the CDA permits the contractor with a judgment against the United States on a claim to obtain payment from the judgment fund. The fund is an indefinite appropriation which serves as the source of payment for recovery costs in the first instance. The agency against which the judgment is obtained is obligated to reimburse the judgment fund either from operational funds or a supplemental appropriation.

Q3. YOU STATE IN TESTIMONY THAT THE STATUTORY PROVISIONS ON REMOVAL OF THE COMPTROLLER GENERAL DO NOT "PURPORT TO EXCLUDE THE PRESIDENT FROM HIS TRADITIONAL ROLE." COULD YOU EXPLAIN YOUR READING OF THOSE PROVISIONS AND THE IMPLICATIONS OF THAT VIEW?

A3. The appointment of the Comptroller General is consistent with the regular Appointment Power of the President that requires that he nominate senior executive officials who are then confirmed with the advise and consent of the Senate. Once confirmed, such officials serve at the pleasure of the President.

The special statutory role of the Congress in the removal of the Comptroller does not contradict the traditional prerogatives of the President to initiate removal action. Nothing in the language or the legislative history of the CG statute eliminates this role. It defies logic to interpret the statutory language as removing the President as the key participant in the removal process. While congressional members may be involved in the removal process, the traditional role of the President in initiating removal remains intact.

Mr. BROOKS. Our next witness is Mr. William E. Hardman, president and chief operating officer of the National Tooling & Machining Association. He is accompanied by Bruce N. Hahn, chairman-elect of the Small Business Legislative Council, and Paul J. Seidman, procurement counsel for National Tooling.

Gentlemen, we appreciate your taking time this morning to be with us.

Your prepared statement will be made a part of the printed hearing record, and you may proceed with your comments.

STATEMENT OF WILLIAM E. HARDMAN, PRESIDENT AND CHIEF OPERATING OFFICER, NATIONAL TOOLING & MACHINING ASSOCIATION, ACCOMPANIED BY BRUCE N. HAHN, CHAIRMAN-ELECT, SMALL BUSINESS LEGISLATIVE COUNCIL, AND PAUL J. SEIDMAN, PROCUREMENT COUNSEL

Mr. HARDMAN. Thank you, Mr. Chairman. In the interest of your time today I am going to really summarize this quickly. In testimony today I will call the committee's attention to three instances where the rulemaking process has been or is in the process of being used to thwart last session's competitive procurement legislation.

No. 1, executive branch refusal to implement CICA GAO bid protest provisions. One of the most frustrating experiences for potential bidders is the absence of an effective and economical means of challenging agency procurement practices that are unduly restrictive of competition or otherwise improper.

As noted in my statement, April 14, 1983, to this committee, because of the prohibitive cost of legislation most small businesses utilize GAO bid protest to challenge noncompetitive DOD practices. These protesters are really performing a public service because noncompetitive practices almost invariably result in unnecessary Federal expenditures.

Prior to the enactment of the CICA, GAO bid protests were ineffective. Protests were not timely decided because despite a GAO ruling requiring an agency response in 25 working days, contracting officials responded to protests whenever they pleased. Since a protest did not stay an award until it was decided, an award was often made before a protest was decided. Thus, even if a protester prevailed at GAO more often than not he was deprived of the fruits of his labor because an award had already been made.

Despite the public benefit resulting from successful protests there was no statutory basis for successful protesters to recover their attorneys' fees. In enacting the CICA, Congress sought to remedy these deficiencies by statutorily requiring agencies to respond to protests within 25 working days, staying award until a protest is decided and giving GAO the authority to award attorneys' fees to successful protesters.

The enactment of these provisions should have provided a means for protesters to halt costly noncompetitive procurements. However, the Justice Department on October 17, 1984, sanctioned the continued Federal waste by issuing a memorandum directing agencies not to comply with the bid protest stay and attorney fees provisions contained in the CICA on grounds that they are unconstitutional.

This was shortly followed by a December 17 memorandum to agency heads from Dave Stockman. The Stockman memorandum of course directed agencies to ignore the law and follow the Justice Department position. As a result, the CICA stay and attorney fees provisions have not been included in the FAR regulation.

To the best of our knowledge, this is the first time that high-ranking administration officials have directed Federal employees to violate Federal statutes. Without official encouragement from the Justice Department and OMB, DOD contracting officials have already wasted billions as a result of blatantly ignoring competitive bidding rules. They will no doubt rise to the opportunity offered by these curious actions from the supposed enforcer of the law and protector of public funds.

No. 2, is the implementing regulations—is that the implementing regulations now water down CICA Commerce Business Daily synopsis requirements.

Another example of bureaucratic subversion of the intent of Congress involves the FAR provisions implementing the Commerce Business Daily improvements in Public Law 98-72 and the CICA.

The purpose of these provisions, for which the small business community fought long and hard, is to assure that small businesses receive notice of opportunities in time to bid. In order to achieve this objective it prohibits agencies from issuing a solicitation until 15 days after publication of a CBD synopsis. Although Congress clearly intended that this public law and the CICA require contracting officials to determine that a synopsis was in fact published before issuing a solicitation, implementing regulations permit them to presume that a synopsis was published 10 days after transmission to the Department of Commerce.

Although these provisions are not effective until April, their impact is clear from the application by contracting officials of similar provisions in Defense acquisition regulations. More specifically, millions in sole-source orders that apparently never appeared in the CBD have been repeatedly awarded. When asked if the requirements were synopsized, contracting officers repeatedly state they do not know but that the agency had met its legal obligation by forwarding a synopsis to the Commerce Department.

No. 3, bureaucratic subversion of Public Law 98-525 and Public Law 98-577, technical data provisions. Although their work is not yet complete, bureaucratic subversion of a congressional intent is evidenced by a draft technical data policy implementing fiscal year 1985 Defense Authorization Act and Small Business Competition Act of 1985. Contrary to congressional intent, the draft regulations would increase, I repeat, increase rather than decrease prime contractor rights and data and thus make competitive spare part procurement not more difficult but almost, I would say, impossible.

This would be done by replacing the present rule under which the Government obtains unlimited rights if there is any Government money in the development of parts with a rule requiring 100 percent Government funding in order for the Government to have rights and data. It would even discourage obtaining data with unlimited rights where the Government has provided 100 percent funding.

I believe that this states our major complaints of what has transpired as far as regulation making has gone in the implementation of the recently passed laws. I would be happy to try to answer any questions at this time.

[Mr. Hardman's prepared statement follows:]

TESTIMONY OF
WILLIAM E. HARDMAN

Mr. Chairman and Members of the Committee, my name is William E. Hardman. I am President and Chief Operating Officer of the National Tooling & Machining Association (NTMA). With me are Bruce N. Hahn, Manager of Government Affairs and Public Relations for NTMA and Paul J. Seidman, Procurement Counsel for NTMA.

NTMA represents the tool, die and precision machining industry. Our industry is composed of 14,000 plants almost all of which are small business concerns. These companies build special tools, dies, jigs, fixtures, molds, gauges, special machines (automation, robotics, and production lines) and precision machined parts or components. They use a wide spectrum of equipment and processes, including most machine tools from the simplest lathe to the most complex computer aided design and computer aided manufacturing systems. They commonly achieve tolerances to one ten-thousandth of an inch or less. These companies serve virtually every manufacturing industry in the country, from automotive to aerospace. Their customary means of doing commercial business is to provide sealed competitive bids from which the customer will generally select the lowest bid. This is also typically the practice of major DoD prime contractors, some of whom subcontract up to 80% of their spare parts to our members.

NTMA commends this Committee and the Congress for the enactment last session of the Competition in Contracting Act (CICA), P.L. 98-369; provisions in the FY 1985 Defense Authorization Act (P.L. 98-525) aimed at curbing long ingrained

abuses in spare parts procurement, and the Small Business Competition Enhancement Act of 1984, P.L. 98-577. These laws are designed to remove ineffective bureaucratic barriers to the use of open competition in any purchasing system. There is absolutely no better guarantee of fair prices than the employment of open competition in any purchasing system. Certainly the government is no exception, and it will permit from \$7-10 billion per year to be saved in DoD spare parts procurement if it were used as the rule rather than the exception. We are disappointed that despite these newly enacted laws, the bureaucracy is continuing with business as usual. More specifically they have used, and are continuing to use the rulemaking process to frustrate the Congressional intent of more competition in government procurement.

I last appeared before this Committee on April 14, 1983. At that time we called for legislative reform of the federal government's procurement process. Our concern at that time was that billions of dollars were wasted on costly non-competitive procurement of goods and services by the federal government. Subsequently, there have been numerous Administration initiatives as well as three pieces of legislation passed in the last Congress intended to reduce waste by increasing the use of open competition in government procurement. To the extent that these efforts are successful, more of those who make up our industry will be allowed to bid on government procurements of such items as military spare parts and components of weapon systems, thereby potentially saving billions of tax dollars a year and simultaneously expanding the defense industrial base.

The well constructed legislation passed last year contained many elements which could increase the use of competition in government procurement. Unfortunately, DoD isn't listening. There has been little increase in the use of competition in either spare parts or other federal procurement. The Defense Department employed open competition only 5.5% of the time in procurement in 1983, despite clear evidence that the cost savings as high as 50% would result and despite initiatives from the Secretary of Defense going back to 1982. This has been confirmed by our conversations with our own members as recently as February 3-8, 1985, at our Annual Convention. There has not been a significant increase in the use of open competition in spare parts procurement by DoD. We were told by our members that the general experience was a slight increase in interest in the use of competition severely constrained both by current anti-competitive regulations and manpower shortages. Some NTMA members have noted intransigence to the use of competition in procurement by some procurement centers. An oft-cited example in the latter case is Kelly Air Force Base in Texas. We are currently seeking a meeting with officials at the facility to learn more about the problems they face and to see if we can offer constructive suggestions to increase the use of competition in spare parts procurement.

The opposition to the use of competition in procurement is still strong, particularly within DoD. It exists primarily where it always has -- among the mid-level bureaucrats in the bowels of the Pentagon. These individuals are still effective in

frustrating the intent of Congress and the Administration. They are frustrating Congress by developing regulations which will be least effective in increasing competition. They are frustrating the Administration by providing biased information to key appointed decision makers. The technique employed is to block the flow of objective information to key decision makers and to substitute misleading and/or incomplete information which would lead any appointee not expert on the subject matter to an erroneous conclusion.

In my testimony today, I will call the Committee's attention to three instances where the rulemaking process has been, or is in the process of being used to thwart last sessions competitive procurement legislation. Such instances involve the (1) GAO bid protest and (2) Commerce Business Daily synopsis requirements contained in CICA, as well as (3) the technical data reforms contained in P.L. 98-525 and P.L. 98-577. In addition, I would like to call this Committee's attention to proposed legislation involving the Freedom of Information Act (FOIA), which would make it unduly burdensome and costly for new sources to compete for spare parts procurement.

I. Executive Branch Refusal to Implement CICA GAO Bid Protest Provisions

One of the most frustrating experiences for potential bidders, is the absence of an effective and economical means of challenging agency procurement practices that are unduly restrictive of competition or otherwise improper. As noted in NTMA's April 14, 1983 statement to this Committee, because of the prohibitive cost of litigation, most small businesses utilize GAO

bid protests to challenge noncompetitive DoD practices. These protesters are performing a public service because noncompetitive practices almost invariably result in unnecessary Federal expenditures.

Prior to the enactment of the CICA GAO Bid Protests were ineffective. Protests were not timely decided because despite a GAO rule requiring an agency response in 25 working days, contracting officials responded to protests whenever they pleased. Since a protest did not stay an award until it was decided an award was often made before a protest was decided. Thus, even if a protester prevailed at GAO, more often than not he was deprived of the fruits of his labor because an award had already been made. Despite the public benefit resulting from successful protests, there was no statutory basis for successful protesters to recover their attorneys fees.

In enacting the CICA Congress sought to remedy these deficiencies by statutorily requiring agencies to respond to protests within 25 working days, staying award until a protest is decided and giving GAO the authority to award attorneys fees to successful protesters. The enactment of these provisions should have provided a means for protesters to halt costly noncompetitive procurements.

However, the Justice Department on October 17, 1984 sanctioned continued Federal waste by issuing a memorandum directing agencies not to comply with the bid protest stay and attorneys fees provisions contained in the CICA on grounds that they are unconstitutional. This was shortly followed by a

December 17 memorandum to agency heads from OMB Director David Stockman. The Stockman Memorandum directed agencies to ignore the law and follow the Justice Department position. As a result, the CICA stay and attorneys fees provisions have not been included in the Federal Acquisition Regulation. To the best of our knowledge, this is the first time that high ranking officials have directed Federal employees to violate Federal statutes.

Without official encouragement from the Justice Department and OMB, DoD contracting officials have already wasted billions as a result of blatantly ignoring competitive bidding rules. They will no doubt rise to the opportunity offered by these curious actions from the supposed enforcer of the law and protector of public funds.

II. Implementing Regulations Water Down CICA Commerce Business Daily Synopsis Requirement

Another example of bureaucratic subversion of the intent of Congress involves the FAR provisions implementing the Commerce Business Daily improvements in P.L. 98-72 and the CICA. The purpose of these provisions, for which the small business community fought long and hard, is to assure that small businesses receive notice of opportunities in time to bid. In order to achieve this objective it prohibits agencies from issuing a solicitation until 15 days after publication of a CBD synopsis.

Although Congress clearly intended that P.L. 98-72 and the CICA require contracting officials to determine that a synopsis was in fact published before issuing a solicitation, implementing regulations permit them to presume that a synopsis was published

10 days after transmission to the Department of Commerce. FAR 55.203(f). (Attachment 1) Although these provisions are not effective until April, their impact is clear from the application by contracting officials of similar provisions in the Defense Acquisition Regulation. More specifically, millions in sole source orders that apparently never appeared in the CBD have been repeatedly awarded. When asked if the requirements were synopsisized, contracting officers repeatedly state they do not know, but that the agency had met its legal obligations by forwarding a synopsis to the Commerce Department.

III. Bureaucratic Subversion of P.L. 98-525 and P.L. 98-577 Technical Data Provisions

Although there work is not yet complete, bureaucratic subversion of Congressional intent is evidenced by a draft Technical Data Policy implementing the FY1985 Defense Authorization Act (P.L. 98-525) and Small Business Competition Enhancement Act of 1985, P.L. 98-577. Contrary to Congressional intent the draft regulations would increase rather than decrease prime contractor rights in data and thus make competitive spare parts procurement more difficult. (Attachment 2) This would be done by replacing the present rule under which the Government obtains "unlimited rights" if there is any Government money in the development of a part with a rule requiring 100% Government funding in order for the Government to have rights in data. It would even discourage obtaining data with unlimited rights where the Government has provided 100% funding!

IV. Proposed FOIA Amendments Would Frustrate Access to Government-Owned Technical Data Needed to Compete for Spare Parts Contracts

On January 3, 1985, Senator Orrin Hatch introduced S.150, entitled the "Freedom of Information Reform Act." A similar bill passed the Senate last session.

If enacted, S.150 would be highly detrimental to small businesses that obtain Government-owned technical data from Service data repositories to bid on spare parts contracts. S.150 would eliminate the current FOIA fee ceiling of the direct cost of search and duplication. This limitation on FOIA fees was added by Congress in 1974 to curtail the prevalent bureaucratic practice of using high fees to frustrate requests for disclosure.

S. 150 would provide for the recoupment of all costs, including "services involved in examining records for possible withholding or deletions to carry out determinations of law or policy." In the case of commercially valuable information such as technical data it would permit the Government to charge "a fair value fee or royalties or both, in addition to or in lieu of any processing fees otherwise chargeable." Thus in order to obtain technical data to bid, small businesses would likely have to pay a portion of the Government's research and development expenditure and this could cost thousands and eliminate competitive bidding for all practical purposes.

S.150 would also relax FOIA time limits at a time when agencies are taking months to respond to requests for procurement data. The time for bidding is generally 30 days.

We call S.150 to your attention because the FOIA is within this Committee's jurisdiction. The provisions of this bill should be rejected because it would undo much of the good work in the area of procurement done by this Committee and the Congress last session. Given this Committee's role in the procurement area we suggest this Committee take the initiative and report a bill which would guarantee prompt access to technical data needed by would-be bidders independent of the FOIA. We would be glad to work with you on this. Such a provision should provide that such data is to be provided free, or at the minimum limit fees to the direct cost of search and duplication.

CONCLUSION

Although Congress passed competitive bidding laws last year, vigorous oversight is necessary to assure proper implementation. We look forward to working with you on this continuing endeavor by calling to your attention instances where proper implementation does not occur.

This concludes my prepared statement. If you have any questions, I would be happy to answer them.

EXHIBIT 1

Federal Acquisition Regulation 5.203 (f)

5.203 Publicizing and response time.

Whenever agencies are required to publish notice of contract actions under 5.201, they shall proceed as follows:

(a) A proper notice of the contract action shall be published in the CBD at least 15 days before issuance of a solicitation.

(b) Agencies shall allow at least 30 days response time for receipt of bids or proposals from the date of issuance of a solicitation.

(c) Agencies shall allow at least 30 days response time from the date of publication of a proper notice of intent to contract for architect-engineer services or before issuance of a unilateral sole source order under a basic ordering agreement or similar arrangement.

(d) Agencies shall allow at least 45 days response time for receipt of bids or proposals from the date of issuance of the notice required in 5.201 for contract actions categorized as research and development.

(e) Nothing in this subpart prohibits officers or employees of agencies from responding to requests for information.

 (f) Contracting officers may, unless they have evidence to the contrary, presume that notice has been published 10 days (6 days if electronically transmitted) following transmittal of the synopsis to the CBD.

DRAFT

EXHIBIT 2

Technical Data Policy

Introduction -

Both PL 98-577 and 98-525 require that regulations be issued under the FAR system defining the legitimate proprietary interest of the United States and its contractors in "technical or other data". Both Acts list various factors to be considered in the development of the regulations. PL 98-577, applicable to civilian agencies, also prescribes certain rules that are to be followed in certain types of situations. Both Acts define the term "technical data" in a manner that limits it only to data relating to "supplies procured by an agency." Thus, while both Acts require regulations dealing with a broad range of "technical and other data" most of the more detailed requirements of these Acts address only "technical data" as defined in the Acts. Thus, the Acts principally address supply contracts or contracts calling for delivery of end items developed under the contract. As used in these Acts the term "technical data" would not apply to data delivered under contracts not requiring the delivery of hardware, such as most contracts for basic or applied research.

This statement is intended to provide guidance in the wider range of contracts, as well as grants, in which technical data is generated. The principles established are consistent with PL 98-577 and PL 98-525.

Objectives of Government Technical Data Policy/Legitimate Proprietary Interest

The needs of the Government for technical data, and the uses to which it will be put, of necessity vary depending on the situation. In supply contracts the need will ordinarily be limited to information on operation and maintenance. In contracts for engineering development and production there may be a need for data to allow second sources or competitive procurement of subsystems or components. In contracts for basic and applied research the Government's only need may be to ensure that the knowledge generated under the contract is made available to others working in the field.

However, these needs must be satisfied in ways that recognize the proprietary interests and expertise that contractors and grantees have provided. Contractors and grantees have a legitimate interest in the protection of data resulting, in whole or in part, from private investment. This is especially true when the data relates to products or processes developed at private expense. Contractors, subcontractors, and grantees should also be given the opportunity to build upon the expertise that they bring to the contract or grant effort.

Thus, in addition to satisfying the mission needs of the agencies, a basic objective of Government data policy is to encourage the commercial development and marketing of new ideas

and technologies developed during the performance of Government supported research through the structuring of Government grants and contracts in ways that allow agency needs and missions to be met without creating disincentives for commercial development and marketing of new ideas and technologies. The policies established below recognize that leaving the contractor the exclusive right to market its technology is a powerful incentive to encourage the undertaking of such marketing. Care must be taken that the Government not destroy these incentives lest neither the contractor or other U.S. firms will have an incentive to market new ideas. Indeed, there is reason to be concerned that destruction of proprietary positions would inure primarily to the benefit of foreign competitors that enjoy Government subsidies or concessions in their home markets, and which would take advantage of freely available technologies developed with Government support to compete in the U. S. and world market. It is therefore imperative that the data provisions of Government research awards are structured to encourage the ability of U. S. firms to compete in world markets.

A second objective of Government data policy is to encourage the most qualified commercial concerns to participate in Government R&D programs by providing them with confidence that their proprietary commercial positions will not be placed in jeopardy by competing for or performing research and development work for the Government, either as a prime contractor or as a subcontractor. This objective is fully compatible with the objective above since participation should also be encouraged by the prospect that the contractor will also be in a position to commercialize any new technologies that emerge during the performance of the contract.

Policies

Section 1. Treatment of Proposals

Proposals submitted to Government agencies for the conduct of research and development, whether solicited or unsolicited, shall be treated as confidential and not disclosed to persons outside the Government except for evaluation purposes. When disclosing proposals to persons outside the Government, including consultants or special employees, the agency should take appropriate steps to insure that such persons will not further disclose the proposal to others. Agencies should not disclose unsuccessful proposals or successful proposals which are not incorporated directly or by reference in the award instrument to third parties without the permission of the submitter. Persons submitting proposals to the Government shall be permitted to mark those portions of the proposal which contain trade secrets or commercial or financial information which they would not want released even if an award is made which incorporates the proposal, and agencies shall not discriminate against marked proposals in the award process. If a proposal that is marked is incorporated directly or by reference into an award document, the

agency shall maintain the marked portions in confidence and refrain from disclosing portions of the award document which contain the marked information unless the proposer specifically agrees to the release of the information.

Section 2. Treatment of Technical Data in Supply Contracts

When an agency is procuring standard commercial products or processes that are offered for sale to the public or which the vendor is planning to offer for sale to the public, the Government shall not seek to obtain detailed technical data relating to the product or process for the purpose of reprourement. An agency may obtain data necessary for in-house operation and routine maintenance of the product or process. When it would be impractical to rely on vendor services for repair of the product or process, data necessary to allow in-house repair may be obtained. Normally, however, this should be limited to form, fit, and function type data, and the Government should not seek detailed technical data. If, in unusual cases, detailed technical data must be obtained to enable in-house repair, the contract will specifically limit the Government's right to use this data for repair only.

Section 3. Treatment of Technical Data in Contracts for Engineering Development and/or Production

This section addresses contracts which have as their purpose the development of specific end items or processes, such as a weapons system or a component of such a system. It also has application to contracts for the development of processing or manufacturing facilities, either full scale or prototypes designed to establish commercial-scale feasibility.

(a) Treatment of Technical Data Related to Products or Processes Developed in Whole or In Part at Private Expense

Agencies should structure their data rights clauses and data requirements so as to minimize the possibility of the disclosure of technical data of their contractors and subcontractors which relates to products or processes developed at private expense by the contractor or subcontractor and which the contractor or subcontractor wishes to maintain as proprietary. The fact that the data developed under the contract may relate to a modified version of the product or process that was developed at private expense shall not affect the obligation of Government agencies to minimize the possibility of disclosure, if the disclosure would, in fact, make it easier for others to manufacture or use the unmodified product or process that was developed at private expense.

Agencies should normally allow contractors or subcontractors to provide form, fit, and function data, in lieu of detailed technical data if the data will describe products or processes

developed at private expense or improvements or modifications of such products or processes. Moreover, except when the agency has specifically identified needs for detailed technical data, contract specifications or work statements should not require the delivery of technical data.

In no event shall an agency obtain detailed technical data for the purpose of reprocurement or second sourcing that relates to a product or process which is offered or to be offered for sale by the contractor or subcontractor. This is most likely to have application to subsystems or components obtained through subcontractors and which are sold commercially.

If an agency has a specific need for detailed technical data such as to enable in-house manufacture or repair, reprocurement, or the establishment of alternative sources, and the paragraph above is not otherwise applicable, the agency should allow the contractor to mark as proprietary any such data that relates to products or processes developed at private expense or to improvements or modifications to such products or processes, and the rights of the Government to use and disclose the data to others shall be specified and defined in the contract. When the needs of the agency are not definite, for example, where it is possible that the Government may wish to establish multiple sources of supply for an item but a definite decision cannot be made until after testing, evaluation, and other considerations have been taken into account, agencies should consider using deferred ordering systems under which the detailed technical data concerning the item would remain under the control of and in the possession of the contractor until a decision has been made concerning the actual need for delivery of the data. Agencies should, in any case, strive to avoid issuing RFPs using detailed technical data of the type discussed above in which the Government has rights and should seek methods of reprocurement and second sourcing that will limit access to such data to the organizations selected as alternate sources.

(b) Treatment of Technical Data Related to Products or Processes Developed Wholly Under the Contract

In engineering development or production contracts, unless the agency has identified specific needs for detailed technical data, it shall not require the contractor to deliver detailed technical data even if the data relates to products or processes developed wholly under the contract. It should be recognized that detailed technical data, even if not directly related to privately developed products or processes, may be useful in the development of new commercial products and processes. In this context, it must also be recognized that in many cases the data will build upon the past experience, expertise, know-how, and organizational abilities which the contractor or subcontractor brings to the project. As a practical matter, it is not likely that a meaningful segregation can be made between the know-how generated under the contract and the know-how and expertise which

the contractor applied to the contract. Thus, the best way to protect the contractor's or subcontractor's equity, if this is consistent with the needs of the agency, is not to require the delivery of detailed technical data.

However, if the agency determines that it needs detailed technical data (or less detailed data such as form, fit, and function) related to a product or process developed wholly under the contract for the purpose of competitive acquisition of the product or process in substantial quantities in the future, then it shall take the data with no restrictions on its use, although it should not prevent the contractor from also making use of the data. However, the agency should consider using deferred ordering approaches to the delivery of any detailed technical data needed for competitive acquisition purposes.

In all other cases when technical data related to a product or process developed wholly under the contract is required to be delivered, whether it is detailed technical data or otherwise, the contractor will be allowed to retain ownership in the data, but the agency shall reserve an unrestricted, royalty-free right to use or have its contractors use, the technical data for governmental purposes, except that the Government shall not have the right to publish the data outside the Government.

(c) Treatment of Technical Data Which is Not Directly Related or Descriptive of Products or Processes Being Developed Under a Contract

It can be anticipated that many engineering development and production contracts will also call for the delivery of technical data that is not related directly to final products or processes developed under the contract. These might include technical reports on preliminary research or tests carried out by the contractor. To the extent such data is required to be delivered under the contract, the policy of the Government will be to normally take such data without markings and with unlimited rights to use and publish the data, but when appropriate the Government may agree to take lesser rights in such data.

Section 4. Treatment of Technical Data in Contracts or Grants for Basic and Applied Research

Contracts or grants for basic or applied research will normally result in the generation of technical data that is not related to end products or processes that are useable either by the Government or the public. To the extent that technical data is required to be delivered under such grants or contracts, the policy of the Government will be to take such data without markings and with the unlimited right to use and publish such data, subject to any other provisions of the contract related to inventions and patents, copyrights, or other statutory forms of intellectual property protection and subject also to the third paragraph of this section.

However, as with the data discussed in Section 3(c), above, it must also be recognized that technical data, even if not directly relating to products or processes, may be useful in the development of new commercial products and processes. It must also be recognized that in many cases the data will build upon the past experience, expertise, know-how, and organizational abilities which the contractor or grantee applied to the project. Therefore, the policy of the Government will be to provide its contractors and grantees the incentive to develop potential commercial applications of technical concepts and data generated under basic and applied research by minimizing the requirements for the delivery of any detailed technical data under such projects. Detailed technical data shall not be ordered under such projects unless the agency has determined in advance that it has a specific need for such data.

In unusual cases, when detailed technical data called for by a basic or applied research grant or contract may relate to products or processes offered or to be offered for sale by the contractor or grantee to the public, the Government should not take unlimited rights in the data. Instead, the Government should take only the minimum rights needed, if any, in the data to achieve its purposes in requiring the data. Moreover, to the extent practical the Government should not require actual delivery of the data, but should agree to examine it at the contractor's premises.

Section 5. Scope of Data Rights Clauses

Any rights which the Government obtains to technical data will be limited to rights in data specifically required to be delivered or prepared under the terms of the work statement, reporting requirements, or specifications of the contract. Broad and sweeping terminology giving the Government rights "in all data first produced or generated in the course of or under this contract" or "in all data generated under this contract whether or not delivered" should be avoided.

Section 6. Software

(a) Except in cases when the delivery of software is specifically required under a contract, agencies shall not normally acquire rights in software generated under contracts and the contractor shall be free to market any software which is developed commercially. Delivery of software shall not normally be required under contracts unless a principal purpose of the contract is the creation of software for use of the Government or for use by others for specifically defined purposes. Thus, for example, the fact that the conduct of a research project might necessitate the development of a computer program to assist the research would not be a basis for the Government claiming rights for itself or others in the program. On the other hand, if the specific purpose of the project was to develop a software program or model for widespread use by a particular class of

investigators, then the agency could consider including conditions in the award that would ensure that the intended beneficiaries of the research will be able to utilize it.

(b) When the Government acquires existing proprietary software, it shall include appropriate conditions in its contract limiting its right to disclose the software to others and specifying the purposes for which the software may be used by the Government. This is intended to include instances when proprietary software is modified to accommodate particular agency needs or hardware configurations.

(c) Normally, when the Government contracts for the development of software to meet specific agency needs, it shall attempt to structure the contract to create an ownership incentive in the contractor to develop or market the software commercially. Thus, unless the agency has a specific need to retain complete documentation on the software in-house, it shall normally allow the contractor to maintain the documentation on its own premises with a right of access, if necessary, for the agency.

Section 7. Definitions

(a) The term "detailed technical data" is intended to include technical data of a type that is necessary to allow the manufacture of a product or performance of a process on a commercial scale, as opposed to performance of a process in a laboratory. Thus, for example, if applied research were being done on the isolation or production of particular compounds on a laboratory scale, a technical report describing the experiments and procedures used would not normally be considered detailed technical data. However, if the contract also entailed research into means of producing the compound in large quantities, for example, if a scaled down production facility were designed and tested, then the know-how gained and the information on equipment design and tolerances, beyond that contained in form, fit, and function data and drawings of the equipment, would normally be considered as detailed technical data.

(b) The term "technical data" means recorded information, regardless of form or characteristic, of a scientific or technical nature. Technical data does not include computer software, and it does not include financial, administrative, cost pricing, and management data, or other information incidental to contract administration.

(c) The term "contract" includes subcontracts, grants and cooperative agreements and the term "contractor" includes subcontractors, grantees and persons or organizations that are parties to a comparative agreement with an agency.

Section 8. National Security Considerations.

Nothing in this policy statement is intended to place limitations on the classification of technical data or software for reasons of national security.

Mr. BROOKS. Thank you, Mr. Hardman, for a splendid statement and for your suggestions and also for the research that you have done on the Freedom of Information Act. We can take a look at that. It is a separate matter but I appreciate your bringing it to our attention at this hearing.

Have your members noticed any increase in the number of competitive procurements for spare parts and other products in the Department of Defense?

Mr. HARDMAN. There has been a little bit of sound and fury at some bases, but the practical result has been insignificant.

Mr. BROOKS. They are still buying those——

Mr. HARDMAN. The answer to your question, Mr. Chairman, is none.

Mr. BROOKS. Yes. They are still buying those \$450 hammers and \$650 toilet seats?

Mr. HARDMAN. Well, the markup on some of that stuff is pretty high, pretty high.

Mr. BROOKS. What is your assessment of OMB's record in promoting procurement reform initiatives in the Government?

Mr. HARDMAN. I would like to state that a year and a half ago I sat in front of the desk of the second in command at OMB and talked to him about the possibility of saving a minimum of \$7 billion a year if competition were improved in the purchase of spare parts, and he held his hand up and waved it in this manner and he said, "Seven billion? Not so much." I was——

Mr. BROOKS. Well, but \$7 billion——

Mr. HARDMAN [continuing]. I was rather appalled.

Mr. BROOKS [continuing]. It adds up. It adds up, you know.

Mr. HARDMAN. Of course. Comes back to the Dirksen statement, after a while you're talking about some real money.

Mr. BROOKS. What have you done to encourage your member companies to participate in the Federal marketplace?

Mr. HARDMAN. Hold seminars almost constantly, bring in Government agencies such as SBA, even the small business people from the Pentagon, attempt to interest our people in every way, get them started, lead them by the hand, use every Government pamphlet and every Government document that has been printed so far on how to do business with the Government. It is a regular ongoing program with us.

Mr. BROOKS. Do you think they understand this unprecedented effort of the President to usurp the power of the Supreme Court and the judicial system in this country?

Mr. HARDMAN. In spite of the fact that the vast majority of our people would be highly supportive of President Reagan, very obviously they are appalled at this move by Mr. Stockman and by the Attorney General.

Mr. BROOKS. Mr. Horton.

Mr. HORTON. Mr. Chairman. I welcome you, Ed, and your assistants, here to the witness table again in the Government Operations Committee. I do recall very vividly the testimony that we had from you about 2 years ago on the matter of spare parts. That helped lead to this particular proposal, which ultimately Mr. Brooks and I were able to make a part of a larger bill which did get signed into law.

I continue to think that the matter of opening up for competition these contracts is very important, especially to the small businesses. And as you know, I have a large number of those small business people in my district. Of course, you have had a couple of presidents that served your organization from right in my district.

Mr. HARDMAN. Yes.

Mr. HORTON. So I am very familiar with your industry and how important this is.

I am concerned as to whether or not this law is going to be followed because of this ruling by the Attorney General. Have you detected that because of that ruling the law itself is not going to be followed as we had hoped it would be?

Mr. HARDMAN. I beg your pardon? I didn't hear your question.

Mr. HORTON. Because of this ruling by the Attorney General, do you have some fear that the opening up of competitive bidding is not going to result the way we had hoped it would?

Mr. HARDMAN. We fear it very much. We know that nothing is going to happen if this holds. Competition will not be enhanced.

Mr. HORTON. Well, as I said earlier, I think it is a very, very major problem that we face. It is a fundamental problem between the executive and the legislature with regard to the action that they have taken, which is completely unprecedented. And I am sure that it will have adverse impact on it.

Well, I do thank you for your testimony, for coming back again. We appreciate it very much.

Mr. HARDMAN. Thank you.

Mr. HAHN. If I could add one thing?

Mr. BROOKS. Yes. The gentleman is recognized.

Mr. HAHN. The position, the administration position regarding the bid protest may not be constitutional but it has certainly been consistent with the efforts to oppose legislation, originating not only from this committee but other committees, to increase competition.

I learned only this morning that a joint task force—I don't have the details—Air Force, Navy and Army task force has reached a tentative conclusion that they don't have the capability to buy critical spare parts competitively, despite the fact that prime contractors can buy competitively up to 70 percent of the time, and that they are going to recommend that DOD buy only through the primes, despite your legislation and legislation from several other committees.

Mr. BROOKS. Mr. Hahn, you know that the military has argued before that they don't spend the money or the time or the effort to break out the spare parts from the prime contract. The easy way, the expensive way, the sole-source way, the rottenest way to contract is just to say, "Well, you all just send us the parts and send us the bill," instead of "How many parts? What do we need?" and then put out specs for it. Sometimes the original producer or the manufacturer has those parts available in the same cases, in the same boxes, the same paper wrapping, the same numbers for considerably less than the prime contractor will deliver them to the Government.

You can buy the parts from the original manufacturer for perhaps 30 percent or 20 percent of what the prime contractor then

delivers them. That is what we are trying to stop. And you are right, they are doing their dead level best to continue it.

I am glad you brought that to our attention.

Mr. HORTON. Well, I am sorry to hear what you just said. That is shocking to me.

Mr. BROOKS. It is shocking to me, too.

Mr. HORTON. When the American people hear about that and the attempt to flout legislation which is designed to eliminate this waste, fraud and abuse, and especially in the spare parts field, I think they are going to be very much upset. This is the military's efforts to circumvent the provisions of laws that have been enacted to try to correct that problem. For the Department of Defense or the services to try to find a way around open competition, especially on these spare parts, is going to be very damaging. The taxpayers are just up to here about this deficit. And if the military services are trying to continue what they have been doing, and to circumvent this legislation, I think there is going to be very drastic reaction from the people of this country.

Mr. HAHN. Well, this committee will have oversight perhaps later in this year over legislation that will enable more avenues to thwart the legislation you passed last year. The Senate introduced amendments to the Freedom of Information Act. Our members use the Freedom of Information Act many times to get data packages to be able to bid from Defense Department officials who don't really want competitive bids. So we use it. Our members use it.

The modifications would allow the Department of Defense to charge virtually unlimited amounts for those data packages, thereby giving them back a tool that they used to use very effectively to prevent competitive bids.

Mr. BROOKS. You can count on them to always do the right thing, can't you. But I don't believe it.

I want to thank you all very much, gentlemen. Thanks for coming down.

Our final witness this morning is A.G.W. "Jack" Biddle, president of the Computer & Communications Industry Association. We are glad to have you back with us.

He is accompanied today by Dave Cohen, a senior partner with Cohen & White, and P. David Pappert, president of ViON Corp.

Jack and Dave, we are glad to have you back. Mr. Pappert, we welcome you to your first appearance before the subcommittee.

Mr. Biddle, your prepared statement will be made part of the printed hearing record.

At the conclusion of our discussion with you and any questions which we might have, I would ask unanimous consent and without objection to put in the record a statement from CBEMA on this same matter. They say that the GAO bid protest mechanism creates a vendor self-policing environment in which to maintain the integrity of the process whereby large numbers of vendors can compete to the Government's advantage—keeping the market clean and honest. So that is an objective, optimistic view. I hope we can achieve it.

[See appendix B.]

Mr. Brooks. Jack, it is all yours.

STATEMENT OF A.G.W. BIDDLE, PRESIDENT, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, ACCOMPANIED BY DAVID S. COHEN, SENIOR PARTNER, COHEN & WHITE, AND P. DAVID PAPPERT, PRESIDENT, VION CORP.

Mr. BIDDLE. Mr. Brooks, always a pleasure to be back, Mr. Horton.

Before I start, I would like to commend you, Mr. Horton, for the recent hiring of Greg Kilgore from CBEMA. I think that will put somebody on your staff that fully understands some of the unique problems in our industry. We look forward to working with him in that capacity.

Mr. HORTON. Thank you.

Mr. BIDDLE. I know your time is short, Mr. Brooks. I think you know that we have fought long and hard alongside of you and Mr. Horton and other Members of both the House and the Senate to try to clean up some of the problems facing us in the Federal procurement arena.

Fortunately, in the past year you did two things: one, you gave GAO legal powers to do that good job that they have been doing in the past, and gave them some teeth. Unfortunately, the executive at this point wants to pull those teeth.

From our perspective we also have, at least on a 3-year trial, the GSA bid protest procedures. And fortunately, the executive has not been able to pull the teeth of those.

What we have seen to date is that the GSA bid protest procedures work. The agencies, as soon as a bid protest is filed, go back and reexamine whether in fact they were soliciting free, fair, and open competition. And we think it will clearly demonstrate what the GAO procedures could provide the rest of the Federal procurement process if their teeth had not been pulled.

I think you know our views on this subject. Perhaps the most we could add to this record would be the experience of Dave Pappert who has been in the trenches in this game of selling to the Federal marketplace and finding out what it is like to beat your brains out for 9 months to win an order only to find that you lost it because it was rigged. And when you get a sustained protest it is still too bad because your competitor has already installed the equipment.

So if I may, I would like to kind of turn it over to Dave for some front trench wisdom.

[Mr. Biddle's prepared statement follows:]

STATEMENT OF

A.G.W. BIDDLE

Mr. Chairman, members of the Subcommittee, it is a pleasure to testify regarding the bid protest provisions of the Competition in Contracting Act (CICA). It was approximately 11 months ago today that I appeared before you to testify regarding H.R. 5184 which contained the bid protest sections of the Competition Act. At the time of that testimony, enactment of H.R. 5184's bid protest sections appeared to be an uphill fight. Critics alleged that the bill was unworkable and would unduly complicate the procurement process. It is a tribute to the legislative skill of members of this committee that they were able to overcome these criticisms, and successfully shepherd the bid protest sections of H.R. 5184 into law. The limited experience we have had to date show that CICA's bid protest sections have already become an effective tool of procurement reform--even though some of those provisions have been gutted by the Department of Justice's spurious Constitutional arguments.

Our association has a vital interest in the establishment of an effective bid protest system. CCIA represents over 70 member companies which encompass all facets of the computer and communications industries. Our members' combined annual revenues currently exceed \$30 billion. Many of our members derive significant income from successful competition in the federal market.

This Committee's report on H.R. 5184 has already summarized the critical weaknesses of the bid protest system prior to enactment of the Competition in Contracting Act. The same report also makes clear why an effective bid protest system is needed.

Except for expensive and usually unsuccessful suits in federal courts, bid protests are the only means of enforcing requirements for full and open competition. Without an effective protest system, vendors must rely on agencies to police themselves. This Committee's numerous oversight hearings prove beyond doubt that self-policing does not stop the torrent of noncompetitive procurements which have significantly increased the cost of goods and services procured by the Government.

The Committee's hearings on H.R. 5184 established that an effective protest system must include a provision to stop contract award and if possible performance while a bona fide protest is pending. If the agency proceeds to award, the protest will generally not produce corrective action because the cost of correction will be too high when the protest is decided. As a result, agencies have proceeded with their contracts in the face of a protest, knowing that they can preclude relief simply by delaying the protest process, or by spending as much money as possible under the contract before the protest is decided. The pre-CICA protest system could not enforce pro-competition legislation passed by Congress.

The Competition in Contracting Act strengthened GAO's protest procedures by removing the ability of agencies to award, and in some instances, perform contracts after a legitimate protest was filed. The Act set forth the general rule that award or, in some instances, performance must be suspended pending a decision of a bid protest by the Comptroller General. However, to ensure that vital agency missions would not be compromised,

the Act allowed the head of the procuring activity to proceed with performance or award after making a written finding that compelling, exigent circumstances which significantly affect the United States' interests will not permit awaiting GAO's decision.

This provision of the CICA could have significantly strengthened GAO's ability to provide effective relief for meritorious protests. I believe that it is precisely because this provision of CICA is so critical to an effective protest system that the Department of Justice has chosen to challenge its constitutionality, and OMB has instructed agencies not to comply with the law.

This Committee will hear today from eminent Constitutional scholars who are far better able than I to explain why the Competition in Contracting Act is consistent with the Constitution and the separation of powers provisions cited by the Department of Justice. I will leave the merits of the Constitutional issue to those scholars. I can say after reviewing the arguments that I believe CICA to be constitutional, and that our Association is prepared to file an amicus brief in support of an appropriate test case. Moreover, the Executive Branch's own actions show that it does not seriously question the constitutionality of CICA's provisions for withholding award pending protest. There is a far more serious issue at stake in the debate over CICA.

This Committee should carefully study the terms of the FAR or Federal Acquisition Regulation Circular 84-6. This Circular, which was issued as an interim rule on January 15, 1985, contains

the FAR regulations concerning bid protests. And among the regulations are provisions for withholding award pending GAO protest--the central point in the debate over CICA. In fact, the FAR Circular adopts CICA's structure by establishing a blanket prohibition against award pending protest which can only be waived if the procuring activity makes certain findings. In words that could have appeared in CICA, the FAR Circular states:

When the agency has received notice from GAO of a protest filed directly with GAO, award shall not be made until the matter is resolved unless the contracting officer or other designated official determines in writing...

that certain conditions are met. The exceptions to the FAR's prohibition against award pending GAO protest are as follows:

First, award may be made if the supplies or services are urgently needed. This test is similar to the required finding of the Competition in Contracting Act.

Second, the FAR Circular allows award if the delivery or performance will be unduly delayed.

Third, the FAR Circular allows award pending protest if award is otherwise advantageous to the Government.

In other words, the only significant difference between the rules for withholding award pending protest in CICA and the rules in the FAR is that CICA imposes a much stricter standard that will allow award of fewer procurements after a protest has been filed. But both the FAR regulations promulgated by the Executive Branch and the Competition in Contracting Act passed by Congress establish the same basic structure: agencies are generally prohibited from awarding contracts after the filing of

a GAO protest until the protest is resolved.

The issuance of FAR Circular 84-6 shows that the Executive Branch does not truly believe that it is unconstitutional to withhold contract award pending resolution of a protest by the General Accounting Office. If the Executive Branch really believed this, it would not have issued the Circular. The logic of the Justice Department would make 84-6 no less unconstitutional than the Competition in Contracting Act. The Executive Branch's actions speak more loudly than the Justice Department's words. FAR Circular 84-6 shows that both Congress and the Executive Branch agree that the Constitution is not violated if contract awards are stopped pending GAO protest. The Executive Branch's attack on CICA is really directed not at CICA but at Congress. By elevating a regulation over a statute, the Executive Branch has struck at the heart of our Constitutional system. We believe that this represents contempt of Congress by the Executive.

In addition to creating a serious constitutional issue, OMB's instructions to ignore CICA's criteria for withholding award pending GAO protest have weakened GAO's ability to increase competition through the protest process. Although the GAO has taken substantial steps to implement CICA's protest reforms, the GAO remains powerless to recommend effective remedies in numerous protests because agencies will proceed to award as quickly as possible. CICA's 90 working day deadline for resolving most protests will help reduce the number of procurements which will be awarded before a protest is decided. However, numerous

defective awards will occur in defiance of the law passed by Congress. This sad situation prevents CICA from realizing its fullest potential. The bid protest system cannot force agencies to mend their ways unless it has teeth. And unless award is withheld pending protest, the system will not provide effective corrective action.

This situation is unfortunate because our limited experience with CICA's bid protest systems shows that CICA--if fully implemented--will expand competition in federal procurement. As the Committee no doubt recalls, the Competition in Contracting Act provides for two protest forums. The first is the General Accounting Office which is embroiled in a spurious Constitutional debate. The second protest forum is the GSA Board of Contract Appeals whose jurisdiction is limited to protests involving data processing procurements. CICA generally requires the GSA Board to stop award pending protest unless the procuring agency can prove compelling circumstances which require a prompt award. Since the GSA Board of Contract Appeals is indisputably part of the Executive Branch, no one has challenged the constitutionality of CICA's procedures insofar as they pertain to the GSA Board.

The Board's protest jurisdiction has only existed since January 15. But in that limited period, it has proven a potent tool for vendors attempting to open a restrictive specification to competition. In one case, the threat of a GSA Board protest forced an agency to re-examine its specification for a procurement in excess of \$100 million. After re-examination, the agency "clarified" the specification, and allowed more companies

to compete. We understand that the same phenomenon is also occurring in one of the protests now pending before the GSA Board.

The message is clear: CICA works. When faced with the choice of confronting an effective protest system or increasing competition in their procurements, agencies are beginning to understand that they should increase competition. This is precisely the result intended by Congress.

Unfortunately, the gains which we have already seen may be confined to data processing procurements unless the GAO is allowed the full range of tools provided by CICA. The Executive's constitutional attack on the GAO protest system is particularly unfair because GAO has taken steps to prevent what the Executive Branch feared when CICA was passed: the delay of awards by the filing of frivolous protests. CICA anticipated this concern by specifically providing for the dismissal of such protests. And GAO is complying with the intent of Congress. Recent reports state that GAO has received more than 120 protests since January 15. Approximately 40, or one third of that number have been dismissed. If anything, GAO may have been too rigorous in its efforts to make sure that frivolous protests do not burden agencies. There can be little doubt that GAO is fully prepared to discharge the responsibilities mandated by Congress in the Competition in Contracting Act. It is tragic that the Executive Branch has chosen to violate the law, and place spurious Constitutional objections in the path of procurement reform.

This concludes my testimony. I would be pleased to answer any questions which the Committee may have.

Mr. PAPPERT. Thank you. Mr. Chairman, if you please, a word about ViON Corp.

Mr. BROOKS. The gentleman is recognized.

Mr. PAPPERT. We are a distributor and regular dealer of off-the-shelf, general purpose data processing equipment manufactured by a number of suppliers. We compete in what is known as the IBM compatible marketplace, principally to departments and agencies of the Federal Government.

I have been asked to come this morning with two examples illustrating GAO's recent ineffectiveness in managing effectively an ADP bid protest. And the essence of the problem is that GAO has been without authority to stop performance under contract at the point of protest.

The first example has to do with a solicitation issued by the Department of Interior late last fall in the November 1983 timeframe. In December of 1983—this was for storage devices, you might know them as disk drives—Memorex filed a protest which ViON joined in later on. In January a contract was awarded to Amdahl Corp. The essence of the protest had to do with a defective technical specification.

In July of 1984, 5 months after the equipment had been installed and substantially all of the performance under the contract had been satisfied, GAO sustained the protest. But the conclusions and the recommendations were, and I quote:

We are unable to recommend termination of the contract since the award was made more than five months ago.

The second——

Mr. BROOKS. That is——

Mr. PAPPERT. Please?

Mr. BROOKS [continuing]. Like giving a blood transfusion as soon as you have the coroner's report.

Mr. PAPPERT. Yes, Mr. Chairman.

Mr. BROOKS. Got it?

Mr. PAPPERT. I have learned that.

The second example that I bring occurred approximately a year earlier in 1983. This example was a procurement issued by the Department of Army. On May 23 of 1983 a contract was awarded to IBM. Both the ViON Corp. and Amdahl Corp. protested that the specific equipment by type and model which IBM offered in response to that solicitation was nonresponsive.

This was the most ideal GAO situation that you can see. This protest was heard under what GAO described as the express option where they are obliged to respond within 40 days rather than the 5- or 6-month traditional period illustrated in my first example.

Within 40 days the protest was again sustained. However, the relief was to allow the Army to modify the language that made the alleged nonresponsive IBM type and model responsive. I would point out that in June IBM already had installed the equipment at the Army. And by early August when new bids were offered with the contract language clarification Amdahl and ViON, but I can only speak for ViON Corp., once again recognized that most of IBM's performance had already occurred, the equipment was in-

stalled, the installation charges had been paid and most of the early installment payments had been paid.

And so, once again, my second example illustrates how ineffective GAO has been in delivering effective equity and justice, especially to those of us who are lucky enough to compete head to head with IBM in the marketplace.

Thank you, Mr. Chairman.

Mr. BIDDLE. Those few remaining.

Mr. BROOKS. Thank you very much. That was my first question asking for an example. We have a couple of good ones.

Mr. PAPPERT. Why did I choose this line of work?

Mr. BROOKS. You did well.

How do your member companies view Mr. Stockman's action to direct agency officials to violate the law?

Mr. BIDDLE. It has raised real concerns. We look at their attempt to water down this law. We look at the Paperwork Reduction Act, which as far as the automation aspects go, very little has happened. And we look at Reform 88 whose basic orientation is to go sole source. So we are beginning to seriously question whether the executive branch does in fact want to save the taxpayers' dollars and get our budget in line.

Mr. BROOKS. Jack, do you find it ironic that competition, one of the fundamental principles which drives the private sector, is so foreign to Federal officials and OMB?

Mr. BIDDLE. Well, you know we have had a number of discussions on this subject, Mr. Congressman, and I particularly am shocked even at the argumentative approach that the executive has taken to the Grace Commission report, which again was business executives saying why can't we run Government like we would run a profitmaking venture. And yet you look at the Government's use of automatic data processing equipment and, essentially, the Russian Government is running the same generation equipment we are.

We are so slow in the acquisition process. The planning is not well done. And as Dave has pointed out, the competition is very limited and, frankly, shrinking. OMB should be concerned because if steps are not taken I think they are going to find that the Government will crumble much as Wall Street did for a while when it just could not handle the burden of the paper generated by success.

Mr. BROOKS. Why are Federal procurement officials so terrified of the thought of an effective bid protest system? You would think the world is going to come to an end if people have a hearing on why they got—why they were discriminated against. That is a nicer way to put it, don't you think?

Mr. BIDDLE. Well, there are certain agencies of Government who are very fearful of the sunshine. And the curtains are drawn tight and the walls are very high and they want to keep it that way.

You know, you read the stories of the movement of Federal executives to the private sector and therefore some concern over doing right by their next employer. But frankly, a lot of it I think is just plain laziness. The vendor comes in and says, "I've got the greatest whizbang and I will write the specs for you and I will set it up so that you will get the latest the industry has got. And don't worry about it. We will take care of you." And the lazy contracting officer says, "That's fine with me."

Mr. BROOKS. We'll take care of it and send you the bill?

Mr. BIDDLE. He does not get the bill. I get the bill and you get the bill.

Mr. BROOKS. You figure it costs the taxpayers billions of dollars a year——

Mr. BIDDLE. I think you——

Mr. BROOKS [continuing]. As a result of lax contracting?

Mr. BIDDLE. Yes; absolutely. Billions. And the bid protest process——

Mr. BROOKS. Do you think we ought to feed them raw meat for breakfast or something? I suggested that to a man the other day and he gave me an additional change to the statement. He said, "Feed them raw meat for breakfast every other day and they would be hungry all the time." It is a good improvement on it.

Well, Frank, do you have any questions?

Mr. HORTON. No; I want to thank Jack Biddle and his group for testifying and giving us this information.

I am really concerned about the efforts you heard about earlier, that a task force is trying to find ways to continue going sole source for these spare parts. I am really concerned that there seems to be some grand design to keep competition in the back room. And I really feel that if we are going to find our way out of this deficit problem, we have got to do everything we can to find ways to eliminate waste, fraud, and abuse. I think there is a lot of it to be eliminated by opening up sole source to competition.

And I think your industry is an excellent example of it. I know you have testified before us many times and tried to make some sense out of the need for updating Government computers. I remember testimony we had on that with the Department of Defense. As far as I know they are still living in the past ages. And you have just said that we have got the same equipment that the Soviets have, since we have not upgraded it. Yet it seems like everybody else, even individuals, are upgrading. They are getting more sophisticated computers. Even the kids in the high schools are doing that. Yet apparently there is some mentality in the military and in the administration that does not want to have competition. And I think that is a very unfortunate direction to be heading in.

Mr. BIDDLE. Well, I think we have another problem that is somewhat unique to our industry. And I would hope that Mr. Brooks and yourself would find some time this year to address it. But again, because of the lack of standards in this industry we are rapidly finding that more and more agencies are in effect saying we want IBM or equal.

Now, you know, I am a heretic to say that because the "or equals" are my members. But that means that the Honeywell's and the Burroughses and the NCR's and others who have created and contributed substantially to this industry are increasingly being foreclosed from selling to the Federal Government. And you are going to find yourself with one vendor. And I think you are going to rue the day. But it is coming, and it is coming very, very fast.

Reform 88 is pointed clearly in that direction. I can show you a NASA directive saying they will only consider buying IBM or equal.

Mr. HORTON. Well, I am sure the chairman and I certainly would support some oversight of that Reform 88. I think it might be worth taking a look at.

Mr. BIDDLE. Well, and I think you might want to take an oversight of the pending decimation of the Institute of Computer Sciences and Technology.

Mr. BROOKS. We will take a look at that. And you know, Jack, that my longtime view for 20 years or more has been that only through competition do you have an opportunity for innovative, new, and creative talent to develop. There is no other way. If one company does all of the computer business and it may be very good at what it does, but you eliminate that entrepreneur, that independent mind, that new eggheaded scientist who wants to make a new widget or gadget and who can do it effectively and better than anybody else. That effort we made some years ago—17 or 18 years ago—to open up the computer industry has spawned hundreds of new hardware manufacturers and thousands and thousands of programmers, and software and peripheral manufacturers, and developers all over this country.

As a result of that we may have a chance to remain on the leading edge of technological developments. If you have one company and they inhibit the atmosphere of a fairly large bureaucracy which would be inherent in a one-company operation, we will be sorely pressed to keep up with either the Germans or the Japanese.

Mr. BIDDLE. That is right.

Mr. BROOKS. And to the detriment of American defense and to the serious detriment of American business.

Well, listen, we thank you.

Mr. HORTON. Mr. Chairman, just one other thing.

Mr. BROOKS. Yes.

Mr. HORTON. It happened right here at home. And I have not fleshed all this out yet. But last night my staff was telling me about an instance right here in the House.

Roaches are quite prevalent here in the House of Representatives, and they come in and spray and all that sort of thing to try to get rid of them. But apparently somebody invented a widget that makes a sound that roaches do not like and runs them away somehow. So my administrative assistant went out and bought one of these things for about \$20, and installed it in the office.

I do not know whether it has gotten rid of all the roaches or not. But last night my office was talking about it and apparently—I could not believe it—but apparently, the House is furnishing some of these widgets to Members' offices—the same thing—at a cost of \$250. So I am getting ready to find out about that widget.

Mr. PAPPERT. Maybe they work against lobbyists.

Mr. BROOKS. This concludes our first day of hearings on the constitutionality of GAO's bid protest function.

We have heard from witnesses representing a wide range of interests in this issue and judging from the testimony, the law is constitutionally sound. In fact, the Justice Department appears to stand alone in its specious argument challenging the act. It also seems clear that the President's refusal to comply with the statute that he himself signed into law is in itself unconstitutional.

Our system of government places the final resolution of constitutional issues in the judiciary. Unfortunately, there appears to be no readily available mechanism for Congress to challenge the President's action in this matter in the courts.

I believe the President has received incredibly bad advice from the Attorney General, the OMB Director, and the major procuring agencies on this matter. The present conflict between the President and the Congress can only serve the selfish interests of executive branch officials who wish to preserve their wasteful spending practices. It is quite ironic that such fundamental American concepts as competition and fairness are so foreign to these officials.

As I mentioned in my opening statement, we have rescheduled the testimony of David Stockman and the Attorney General for next Thursday, March 7. We will also be hearing from other Government and private sector witnesses at that time.

I want to thank all the witnesses for taking time to assist the subcommittee in this important and critical issue and I compliment them on their excellent testimony.

The hearing is adjourned subject to call of the Chair.

[Whereupon, at 12:32 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

CONSTITUTIONALITY OF GAO'S BID PROTEST FUNCTION

THURSDAY, MARCH 7, 1985

HOUSE OF REPRESENTATIVES,
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2154, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Frank Horton, Jim Saxton, David S. Monson, and Joseph J. DioGuardi.

Subcommittee staff present: Richard C. Barnes, staff director; Linda J. Shelton, clerk; Mary Alice Oliver, secretary; full committee staff: James E. Lewin, chief investigator; James E. Rife, Charles C. Wheeler, and R. Michael Long, professional staff members; Stephen M. Daniels, minority staff director and counsel; Douglas D. Mitchell and John Parisi, minority professional staff, Committee on Government Operations.

Mr. BROOKS. The subcommittee will come to order. These hearings were initially called to review the charges made by the executive branch that key provisions of the Competition in Contracting Act are unconstitutional.

However, it has become increasingly clear that the issues raised about the Competition Act are greatly overshadowed by a far more significant issue. The ultimate question which the subcommittee must address in this hearing is: Can the President of the United States unilaterally declare a portion of a public law to be unconstitutional and then refuse to enforce it? The answer to this question has serious consequences for the future of our constitutional form of government and the balance of power between its three agencies.

For those of you who think that this is an esoteric subject, let me get right to the point. Unless the balance of power between the three branches of Government remains relatively equal, we are going to end up with a monarchy or a dictatorship. It is as simple as that.

In my opinion, the actions of the President and his agents are unprecedented in the history of our Government. Upon signing the Competition Act into law, the President declared key provisions of that act to be unconstitutional and instructed the Attorney General to inform Federal agencies as to how to implement it. OMB Director Stockman, armed with the Attorney General's opinion, or-

dered Federal officials to willfully violate the law in a directive he issued on December 17, 1984. He directed, among other things, that:

Agencies shall take no action, including the issuance of regulations, based upon the invalid provisions.

With respect to the "stay" provision, agencies shall proceed with the procurement process as though no such provision were contained in the act.

And I continue:

With respect to the damages provision of the act, agencies shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General.

Mr. Stockman has been asked to appear before the subcommittee and we are delighted to proceed with the hearings. I recognize Mr. Horton.

Mr. HORTON. Mr. Chairman, thank you.

I am very pleased to have our distinguished guests here this morning, particularly Dave Stockman, the Director of OMB, and Joe Wright, the Deputy. And I am very pleased to have the other distinguished guests today to help us direct necessary attention to a very great concern of mine: Noncompliance with the bid protest provisions of the Competition in Contracting Act.

The need for these hearings arises from the actions of OMB and the Justice Department, from whom we will hear today. I understand the viewpoint that Justice has expressed with regard to the separation of powers in connection with the Competition in Contracting Act. Obviously, I disagree with that view; and the overwhelming preponderance of testimony presented to us last week certainly reinforced my conviction. Nevertheless, I am not the final arbiter of that matter. But neither is OMB, the Justice Department, or, for that matter, the President of the United States. That is the job of the courts.

So the issue that confronts us today is indeed the separation of powers, but—as I see it—a matter of executive branch infringement. Full implementation of the Competition in Contracting Act, of course, is our immediate objective. But the unilateral declaration by the executive branch that provisions of the act are unconstitutional—despite the President's signature—is blocking implementation.

I find no authority for the Director of OMB to direct Federal agencies to disobey the law, or for the Attorney General to advise that course of action. Accordingly, I hope our distinguished witnesses will reconsider this matter and join us in assuring full and open competition in Government procurement.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you, Mr. Horton.

Our first witness this morning is Mr. David A. Stockman, Director of the Office of Management and Budget. He is a former colleague from Michigan who served with us from 1977 to 1980, when he went to the OMB. And he is, for your information, soon to be a father. I want to congratulate him and welcome him to the ranks.

He is accompanied by Joe Wright, Deputy Director of OMB.

Mr. Stockman, please proceed.

**STATEMENT OF DAVID A. STOCKMAN, DIRECTOR, OFFICE OF
MANAGEMENT AND BUDGET, ACCOMPANIED BY JOSEPH R.
WRIGHT, JR., DEPUTY DIRECTOR**

Mr. STOCKMAN. Well, Mr. Chairman, in regard to your comments, let me begin by noting I have assiduously followed the instructions that you gave me 2 days ago. I arose at 2 a.m. last night, sat in the rocking chair, coddled my testimony in my right arm, and rocked for 30 minutes in order to distill everything that would be relevant to bring to the committee this morning. And, so, now I am here. As you know, I have a long scheduled presentation with another committee and I will try to be quite brief.

You have pretty well summarized the case that I wanted to make in your opening remarks; it is covered in four-page prepared testimony, but let me just hit three or four things and then try to respond to your questions.

Mr. BROOKS. Do you want to put your testimony that you have submitted into the record?

Mr. STOCKMAN. Yes, I would like to do that.

Now, it is obvious that I am not here this morning to raise questions about the merits of the Competition Act. Obviously, we support that and we worked with you over the period of time to update the procurement statutes.

Nor am I here to raise substantive questions about the role of the Comptroller General in bid protest procedures.

But you have raised a specific question in this committee as to the role of OMB and the administration's position generally on the provisions we gave notice to Congress early on that we felt to be unconstitutional.

I would like to review that. In April 1984, I believe we sent letters to all the committees concerned in the Congress, expressing our strong position as to the constitutionality of those provisions. I recall in the signing statement of the President that he made very clear that we took vigorous exception to the two provisions that are under question here. And after the act was signed into law, the Justice Department obviously issued a memorandum analyzing in detail the basis for our constitutional objection.

Now, it was at that time last fall that the Attorney General notified both Houses of Congress, under an existing statute which requires the administration to inform Congress if we conclude that a part or the whole of a statute is not defensible on constitutional grounds in the courts, as to the conclusion reached by the Attorney General. We did that last fall.

Subsequently the Attorney General requested, as a ministerial and administrative service, that we issue a bulletin and provide the details for implementation of his determination that these provisions were unconstitutional and that they should not be enforced affirmatively by the executive agencies.

It was clearly contemplated that that would give rise immediately and early to a constitutional challenge and that the difference that has separated the two branches on the constitutionality of those provisions could be tested and would be determined by the courts at an early date.

As I understand it, suits have already been filed even though the act took effect less than 60 days ago, and that in due time, in fact in early time, we will have a conclusion as to the constitutionality of these provisions and as to whether the legislative or executive branch provision is correct.

So, that summarizes how we arrived at the impasse that we are at today. I could only conclude by saying that in the executive branch in matters of constitutionality of statutes or other matters, the Attorney General is the final voice, makes the final determination and under the procedures that have existed in Government for decades and decades, those who serve in the executive branch are then required or compelled to abide by those determinations.

This is what occurred in this case. After the act was signed, the President requested the Attorney General to make a definitive opinion. He did, and that became binding on the rest of the executive branch, including the Office of Management and Budget.

Our only additional role in this, obviously, was to include in the instructions implementing the act, the policy and the constitutional position that had been taken by the Attorney General.

So that summarizes what I think is relevant to bring before the committee today. It narrows the issue where I think we need debate it and I hope it explains the role that we had in the process.

[Mr. Stockman's prepared statement follows:]

TESTIMONY
OF DAVID A. STOCKMAN
DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE LEGISLATION AND NATIONAL SECURITY
SUBCOMMITTEE OF THE HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

MARCH 7, 1985

I appear today to discuss the role of the Office of Management and Budget in the implementation of certain provisions of the Competition in Contracting Act (enacted as part of the Deficit Reduction Act of 1984, Public Law 98-369 (DEFRA)) that the Department of Justice has concluded are unconstitutional.

I would like to emphasize that the focus of my testimony here is neither the merits of the Competition in Contracting Act (CICA) and its bid protest procedures nor the Comptroller General's role in the bid protest area. The Administration and this Office strongly support the principles of full and open competition implemented in the Act. In fact, CICA adopts the competitive procedures set forth in our proposal for a Uniform Federal Procurement System, which was submitted to Congress in February of 1982. We also believe the Comptroller General's advisory role in resolving bid protests is extremely valuable. Instead my testimony addresses only a narrow question regarding

implementing certain provisions of the Act that the Administration, as it has advised Congress, both in the President's signing statement on DEFRA and in the Department of Justice's views on H.R. 5184, believes to be unconstitutional.

As part of the Competition in Contracting Act, Congress passed two provisions which purported to permit the Comptroller General the authority to bind the Executive Branch. These are the so called stay provisions both pre- and post-award and the awarding of fees. Before the bill was passed, the Department of Justice advised Congress that it believed those provisions to be unconstitutional because they would permit an official of the Legislative Branch to exercise authority which, under the Constitution, can be exercised only by an official within the Executive Branch.

Despite the Department's objections, transmitted to Congress in April 1984, the provisions ultimately were adopted as part of the Act. Thus, in signing the Deficit Reduction Act, the President "vigorously" objected to these provisions and requested the Department of Justice to inform Executive branch agencies how they might comply with the Act in a manner consistent with the Constitution. See 20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

In response to the President's request, on October 17, 1984, the Department of Justice issued a memorandum which concluded

that the two provisions purporting to vest the Comptroller General with authority to bind the Executive Branch were unconstitutional and recommended that these provisions not be enforced by the Executive Branch. The Attorney General directed that this memorandum be distributed to Executive agencies to provide them with the guidance requested by the President. The Attorney General reiterated that position on November 21, 1984 in letters sent to the Speaker of the House and the President of the Senate to inform Congress, as required by statute, of the Department's decision not to enforce these provisions. The Attorney General noted that his decision to advise agencies not to execute the unconstitutional provisions would best assure that these issues ultimately would be resolved by the courts.

The Attorney General also sent a letter to me, dated November 21, 1984, which requested my assistance in ensuring compliance by all Executive Branch agencies with the legal advice provided by the Department of Justice concerning the Act. Upon the advice of my General Counsel as to my responsibility to follow the Attorney General's opinion, on December 17, 1984, I issued a Bulletin to the heads of Executive departments and agencies setting forth procedures governing implementation of the Act and advising Executive agencies of their responsibility to conduct their contracting activities in conformance with the Attorney General's legal advice. The Bulletin also established reporting procedures to ensure that the Department of Justice was promptly informed of the filing of any litigation challenging its

opinion.

In conclusion, I wish to note that the Attorney General's legal advice is binding upon all Executive departments and agencies, which are required to conform their actions to his opinions. OMB, as part of its responsibility to ensure effective administration of Executive Branch activities, routinely issues bulletins to the heads of departments communicating information and instructions on how to respond to various problems that require coordinated responses by the agencies. For example, OMB acted similarly in advising all agencies to notify and coordinate with OMB on matters involving the separation of powers issues raised by the Supreme Court's decision in INS v. Chadha. In short, the actions of OMB in this matter have been ministerial, designed only to assure implementation and coordination of the legal conclusions of the Attorney General and the Department of Justice.

The Attorney General complied with the statute that establishes procedures for notification of Congress in circumstances in which he concludes that he cannot defend the constitutionality of a statute. Furthermore, as the Attorney General has stated, the procedures he followed are intended to provide for a quick judicial resolution of this controversy. I understand that one case involving the disputed sections is pending and there is, accordingly, every reason to believe that such proceedings will provide an appropriate end to this dispute.

Mr. BROOKS. Thank you, Mr. Stockman; I have a few questions which I will briefly ask you. I know that you have another appointment. Under what authority did you issue that December 17, 1984, directive—OMB Bulletin 85-8?

Mr. STOCKMAN. Well, in terms of the generic authority, I imagine it is the statute which empowers us to issue bulletins to carry on various activities and establish standards and regulations and so forth for the agencies as part of the President's responsibility to manage the Federal Establishment.

Mr. BROOKS. Now, since no individual, including the Attorney General or yourself or the President or any of us, has any right to willfully violate the law, what possible authority could you have to order Federal officials to willfully violate the law which was passed by Congress and signed by the President?

Mr. STOCKMAN. Well, Mr. Chairman, I think the authority would be that the Attorney General had determined that the provisions in question were unconstitutional. He had memorialized that determination and directed the agencies of the Federal Government to, in effect, not enforce those provisions so that they could be tested in the courts early. And we simply incorporated in our overall guidance for implementation of the act what is at the moment the prevailing policy within the administration regarding these provisions.

We had no other choice, even if we disagreed with the substance or on the merits with the Attorney General's decision, which we do not. But the point is once he has made a determination, it is binding throughout the executive branch, including on OMB.

Mr. BROOKS. On what basis do you have to make the assertion that the opinion of the Attorney General can determine the constitutionality of a law on a unilateral basis? Why would you think that such an opinion, which is all it is in my judgment, can be binding on all the executive branch agencies?

Mr. STOCKMAN. Well, as a matter of fact, when legal matters or constitutional matters arise in the daily course of government, not only on statutes but on regulations, on a whole variety of other business that we do, when those issues arise and a final resolution has to be made, at least insofar as the conduct of the executive branch is concerned, the Attorney General has the final authority, the final responsibility to make that decision or resolve that issue.

In this case, he has, and, therefore, until we are instructed otherwise, in this case by the courts, we are obligated to adhere to the guidance given by the President's chief legal officer. Now this is not novel, this is not something that we invented. This is a practice that has held its way throughout the executive branch for years and years.

Mr. BROOKS. We are going to try that out in a lawsuit, as you know.

Did you seek the approval of the President or anyone in the White House prior to the issuance of your directive?

Mr. STOCKMAN. Did I seek approval?

Mr. BROOKS. That is right, or guidance.

Mr. STOCKMAN. Well, I think that the whole issue as to the constitutionality was widely discussed within the executive branch, within OMB, within the general counsel's office of OMB. And it

was concluded that this was the appropriate and proper thing to do under the circumstances.

Mr. BROOKS. Now the presumption has been shifted to the plaintiff to prove the constitutionality rather than having the Justice Department defend it.

Mr. STOCKMAN. Well, there is ample precedent, Mr. Chairman, for the Justice Department concluding that certain provisions of duly enacted statutes are not constitutional, and therefore are not defensible. That precedent, that practice, is longstanding.

As a matter of fact, the Congress, as I have indicated in my testimony, enacted statutes that contemplated precisely the circumstance that we are in today. Namely, that the Attorney General would conclude that some part of the statute was not defensible constitutionally, and therefore it would not make the case for the U.S. Government in whatever litigation was pending.

The reason that that is clear is that you would not have passed a statute requiring us to report when that instance arises unless you expected that it would.

Mr. BROOKS. Mr. Horton.

Mr. HORTON. Thank you, Mr. Chairman.

Dave, I accept your proposition with regard to opinions of the Attorney General, and how they are followed by the rest of the administration. But I would like to pose my questions to you on the more narrow basis.

And that is, do you know of any other instance in which the Attorney General has declared a statute, or a law, or a portion of a law unconstitutional, and then had the OMB or other agencies act in violation of that law? I am just confining my question to that very strict declaration of nonconstitutionality.

Mr. STOCKMAN. On that narrow question, I think that the precedent is in the post-*Chadha* decision circumstance that we faced, because there were literally hundreds of statutes on the books at the time of that decision which required legislative vetoes of one type or another.

After the decision, the Attorney General concluded that all of these statutory provisions in their full multitude were no longer constitutional—should not be observed by the executive branch, and expressed an opinion to that effect. And then in the same capacity we followed up with a bulletin or circular to the agencies instructing them as to what the conclusion of the Attorney General was, and as to their procedure and approach on these issues.

Mr. HORTON. But that was after a court decision. In this case, there was no court decision. This is an interpretation made on the Justice Department's own initiative.

Mr. STOCKMAN. That would be a difference. But on the other hand, that court decision in its content was narrow. And then the question became how broad, and what is the extent of coverage of that decision, the *Chadha* decision, on the whole range of statutes that have one type or another of explicit or implied legislative veto.

And the Attorney General then ruled very widely on that question without any further court instruction. And we then in an administrative capacity translated it to the agencies of the executive branch.

Mr. HORTON. Other than supposed followup from that *Chadha* decision, do you know of any other instance?

Mr. STOCKMAN. I am not sure. I do not have any precedence off the top of my head. I would have to defer to the Justice Department on this, because they are the keepers of the constitutionality or the constitutional determinations and the precedents. And it was presented to me at the time as the appropriate and correct thing to do. And on the basis of that advice, the bulletin was issued.

Mr. HORTON. Now you referred to your action as being administrative. On page 4 of your testimony, you allege that, "The Attorney General's legal advice is binding upon all executive departments and agencies, which are required to conform their actions to his opinions," and indicate that you were only following that advice when you directed agencies not to comply with certain provisions of the Competition in Contracting Act.

I remember that just a couple of years ago, however, in June 1982, the Justice Department sent OMB an opinion that would have significantly weakened your power under the Paperwork Reduction Act. Your Office of Information and Regulatory Affairs vigorously and correctly disagreed with that opinion, and OIRA went to great lengths to write regulations which reaffirmed OMB's power, and rendered meaningless the Justice Department's opinion. Why then, with regard to the Competition Act, were you so quick to follow the Department's advice, rather than adhering to the wise course of action which you yourself established a couple of years ago?

Mr. STOCKMAN. Well, Mr. Horton, that is a pretty good example. But I think that my answer is that the Justice Department opinion was a preliminary opinion which we had the chance to analyze, and we were able to persuade them of the errors and incorrect conclusions that were contained in the preliminary opinion.

So they then subsequently revised their opinion which then became the final opinion, and the OIRA regulations were issued pursuant to it or consistent with it.

Mr. HORTON. Thank you very much.

Mr. BROOKS. Mr. Saxton.

Mr. SAXTON. Thank you, Mr. Chairman. In light of your very pointed questions and in light of Mr. Stockman's time constraints, I think that I am going to pass for now. Thank you.

Mr. BROOKS. Mr. Monson.

Mr. MONSON. Mr. Stockman, do you agree with the other provisions of the act other than those that you have pointed out?

Mr. STOCKMAN. Yes. As I have indicated in my testimony, we have tried to work with this committee to get the ball rolling 3 years ago. Along the way, we had some minor differences over more technical features. But in the main, we were strongly supportive, and are grateful to the Congress for enacting the new law.

Mr. MONSON. Who should be the body, then, that determines whether or not fees should be awarded and such?

Mr. STOCKMAN. Pardon?

Mr. MONSON. What office should determine whether fees should be awarded to people that file complaints?

Mr. STOCKMAN. Well, I think that because there is clear and uncontested history and precedent that the Comptroller General is a creature of the legislative branch, that it would have to be an executive branch agency or officer.

Mr. MONSON. Do you have a recommendation as to who that should be?

Mr. STOCKMAN. Well, I do not know that I have any recommendation as to who that should be, except that it would have to be under our constitutional view of it an officer of the executive branch.

Mr. MONSON. Being new to the Federal level, let me ask: Are Attorney General's opinions advisory or binding?

Mr. STOCKMAN. Well, they are binding if appealed, and then reiterated or restated by the Attorney General. Mr. Horton gave the example of a preliminary opinion that we contested or appealed. Then the Justice Department revised that opinion, and it became final. And what I should have stated all through here today is that once a decision is rendered and it becomes final within the executive branch, then your question holds.

Mr. MONSON. It seems to me another point that needs to be raised here is the absence of any authority on the part of the President to veto specific items of legislation that are included in a bill without vetoing an entire piece of legislation. Would you care to comment on the procedures that the Congress follows from time to time that lead many different subjects to be included in one bill? Without the authority to veto particular items, doesn't that force the President into accepting an entire bill?

Mr. STOCKMAN. Well, I think that you are inviting me to say that this particular impasse provides good reason or evidence as to why we need a line item veto. So I will say that. We would not be here today if we had a line item veto, because these two provisions would have been stricken from the act when we signed it.

Mr. MONSON. Thank you.

Mr. BROOKS. Thank you very much. Joe DioGuardi. I will introduce you to Mr. Stockman if you have not met him. Joe is a CPA. And if he was not working for us, he would probably be working for the GAO or for you.

Mr. DIOGUARDI. Well, I am not a constitutional lawyer, that is for sure. But I think that your questions were very pointed, Mr. Chairman, and I do not think that I have anything specifically to say about the matter at hand, except to comment that there is a big credibility gap out there in the public, Mr. Stockman, about the whole procurement process. Only 6 percent of the military contracts, as you know, are competitively bid. And it just seems to me that there are too many horror stories going on. You, as Budget Director, have to look more into what is going on, along with the GAO, to see why we cannot get a dollar's worth of services and goods for a dollar's worth of taxes.

I am just appalled at the accounting systems that I see used in Government, and the accounting methods. As you know, I came out of the private sector. In fact, I was in the same accounting firm as Mr. Bowsher of the GAO. We were both partners there. It just seems to me that we have got to do a lot more when it comes to accountability to the public. We are talking about a budget deficit

of \$200 billion plus, and an accumulated debt of \$1.5 trillion; and that is only what is on the books. We cannot even balance what is on the books. When you look at the unrecorded commitments, it is just a crime, and we have got to do something about it. I just wanted to make that comment.

Mr. STOCKMAN. Let me just respond by saying that I agree 100 percent with everything that you have said. And over the years, we have made a major push to try to improve the contracting procedures as well as the accounting. But I do not think that we are debating that here today, since we are in essential agreement with this committee that has a strong interest on the need to substantially expand the scope and effectiveness of competition within Federal procurement including the Defense Department.

We are on a much more narrow issue, which I know that we can disagree on, the constitutionality of the procedure by which the Comptroller General may suspend awards that are under protest. But I hope that that would not spill over to be interpreted as a general lack of support or enthusiasm for competition in contracting. They are really severable issues, and I hope that we can at least make that clear before my part of this presentation ends.

Mr. BROOKS. We thank you very much. I must say to Mr. Dioguardi that, of course, while we like David Stockman pretty much, he "ain't" too popular at the Pentagon.

Mr. DIOGUARDI. I understand that, Mr. Chairman.

Mr. BROOKS. I appreciate you and your distinguished associate, Mr. Wright, being here today. We are grateful to you. I know that you have another meeting, and we thank you very much for your testimony, Mr. Stockman.

Mr. STOCKMAN. Thank you, Mr. Chairman.

Mr. BROOKS. I will at this time put into the record a copy of OMB Bulletin 85-8.

[See appendix A, No. 4.]

Mr. BROOKS. We will proceed with the hearing.

Our next witness is Steve Ross, general counsel, Office of the Clerk, U.S. House of Representatives. This office is responsible for representing the House in any court proceeding where the constitutionality of a public law is called into question. In fact, he has been asked to intervene for the House in a California case where Lear-Siegler has brought suit against the Navy for noncompliance with the Competition Act. He is accompanied by Charles Tiefer, deputy general counsel, a distinguished lawyer.

Gentlemen, it is nice to have you with us this morning. Your prepared statement will be made a part of the printed hearing record. Counselor, you can proceed.

STATEMENT OF STEVEN R. ROSS, GENERAL COUNSEL, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, ACCOMPANIED BY CHARLES TIEFER, DEPUTY GENERAL COUNSEL

Mr. Ross. Thank you, Mr. Chairman, and good morning. My name is Steven Ross. I am the general counsel to the Clerk for the House of Representatives. And with me this morning is my deputy, Charles Tiefer.

In that capacity, our office represents the interests of the House, its Members, officers, and committees in litigation affecting the official interests of the House of Representatives.

As the chairman noted, our office will be representing the chairman and ranking member Horton as well as the bipartisan leadership of the House in litigation arising out of the Competition in Contracting Act, and we will be appearing on Monday morning in a preliminary injunction hearing which may well determine the constitutionality of the statute.

We appear this morning by invitation of the committee to express our views not only on the constitutionality of the statute, but more so on the actions taken by OMB and the Department of Justice with regard to the unilateral declaration that portions of the statute are unconstitutional and therefore should not be followed.

The action taken by the OMB and the Department of Justice represents an unprecedented attempt by the executive branch to arrogate unto itself the power to decide the constitutionality of duly enacted statutes. As such, it stands as a dangerous call for widespread lawless behavior by those who are sworn to uphold the law.

It is one thing for the branches to disagree on the wisdom and constitutional validity of a proposed statute. After all, the Constitution reserves for the President a role in the legislative process. However, once that process is complete, the duly enacted statute of the United States obtains a presumption of constitutionality. That presumption should only be overcome by a finding of the court.

In this instance, the executive has gone far beyond merely presenting its views to the judiciary in hopes of having a statute struck down, but has instead tried to unilaterally wipe an unwanted statutory provision off the books.

I would now like to turn to the deputy general counsel, Mr. Tiefer, who will be presenting the views of the bipartisan leadership of this committee and the House before the court on Monday. Mr. Tiefer will place the actions of the executive branch in their proper constitutional and historical perspective. Thank you.

[Mr. Ross' prepared statement follows:]

Benjamin J. Guthrie
Clerk

M. Raymond Colley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

STATEMENT ON BEHALF OF THE OFFICE
OF GENERAL COUNSEL TO THE CLERK
OF THE HOUSE OF REPRESENTATIVES
REGARDING
THE EXECUTIVE BRANCH'S DECLARATION
THAT THE COMPETITION IN CONTRACTING ACT
IS UNCONSTITUTIONAL

Mr. Chairman and Members of the Committee, we -- Steven R. Ross, General Counsel to the Clerk of the House of Representatives, and Charles Tiefer, Deputy General Counsel -- are here today on invitation of the Committee to discuss an unprecedented and dangerous step by the Executive Branch in response to the Competition in Contracting Act ("CICA"). The Office of Management and Budget, in issuing its directive of December 17, 1984, has commanded all federal contracting officers, handling well over \$ 150 billion a year in contracts, not to obey a duly enacted Act of Congress designed to encourage competition in procurement.

OMB's action flatly violates the express instruction of the Constitution that the President shall "take care that the Laws be faithfully executed," U.S. Const., art. II, § 3. It represents an assumption by OMB and by the Department of Justice, which advised OMB to take this action, of prerogatives that properly belong where they have reposed for two centuries -- solely in the hands of an independent Judiciary. In essence, it constitutes

the assertion of a new power of Executive supremacy, which this Committee need not, and should not, accept.

On Monday, March 4, 1985, the Department of Justice followed up that OMB directive by attacking the constitutionality of the CICA in its brief filed in a lawsuit brought by a government contractor in federal court in California.^{1/} Yesterday, on Wednesday, March 6, 1985, the Speaker and Bipartisan Leadership Group of the House of Representatives, who we represent in litigation, intervened in that lawsuit to provide an official defense of the act's constitutionality.^{2/}

We believe that under the applicable Supreme Court precedents the challenged Act of Congress is clearly constitutional. We have addressed that in the fifty-page brief, with exhibits, which we filed yesterday in that case. We will present our views to the Court in a hearing in federal court in Los Angeles on Monday, March 11, 1985.

However, the real issue before this Committee today is not the constitutionality of CICA.^{3/} If the Department of Justice

1/ Lear Siegler Inc., Energy Products Division v. John Lehman, Secretary of the Navy, et al., No. 85-1125 (C.D. Cal.).

2/ The Bipartisan Leadership Group consists of the Majority Leader and Majority Whip, the Minority Leader and Minority Whip, and for this lawsuit, Chairman Brooks and Ranking Minority Member Horton.

(footnote continued)

had simply awaited the filing of a proper case, presented its views in court regarding that Act, and awaited the ruling of the court, we would probably not be here testifying. The real issue is that the Department of Justice has gone beyond merely presenting its views in court. It has now taken on unprecedented and unconstitutional powers of Executive supremacy, in presuming to decide the issue in advance of litigation -- and to instruct all executive officials not to obey the law. The real issue for this Committee is the power assumed by OMB in issuing its nationwide directive of December 17, 1984, instructing the contracting officers of the federal government not to obey a duly enacted Act of Congress.

The Events Which Led to this
Assertion of Novel Power

On May 9, 1984, the House Committee on Government Operations

3/ As appendices to this testimony, we are attaching a copy of our brief. Since in many respects the Justice Department's attack on the constitutionality of CICA represents an attack on the whole concept of having an independent General Accounting Office as a check on waste and fraud in the government, we are also attaching a copy of a survey of the practices of the fifty states by the American Law Division of the Library of Congress. That survey shows that "every state has made some provision for an auditor or controller," whose duties are typically akin to the work of the federal General Accounting Office.

reported the Competition in Contract Act of 1985, H.R. 5184, 98th Cong., 2d Sess. In past years, procuring agencies had failed miserably to procure the efficient and money-saving way, through competition. In 1983, for example, a mere one-third of the total procurement had been done competitively -- \$ 54 billion of competitive procurement out of \$ 168 billion of total procurement. The rest of procurement was done noncompetitively, such as by sole-source purchases, often at inflated prices.^{4/}

CICA imposed a series of requirements on federal procuring agencies to increase the amount of procurement done competitively, such as requirements that they await GAO scrutiny before making disputed contract awards. The statute was obviously constitutional, as it just provided as a standard matter the kind of stay needed to avoid agency evasion of GAO

^{4/} The ultimate goal was to prevent such situations as the spare parts scandals of last year, in which this Committee found that the Air Force was at one time considering buying an allen wrench from a largedefense contractor for about \$ 9,000, although its original cost from the actual manufacturer was eight cents.

One of this act's four main approaches was to strengthen the General Accounting Office's bid protest system, as an independent and expert tribunal for resolving protests by potential government contractors who had been excluded from lawful competition. A much-complained about method for procurement officers to avoid GAO scrutiny had been for them to award the contract while GAO was deciding the protest, thereby presenting the GAO with a fait accompli about which there was little to be done. The Act sought to cure that by a stay provision that prevents procurement officers from awarding contracts while the protest is pending before GAO. Similar stays had been ordered often by the courts precisely to prevent such fait accomplis; the act provided for such stays on a regular basis.

decisions which the courts had granted routinely for fourteen years.

Nevertheless, President Reagan, in signing the Deficit Reduction Act on July 18, declared certain provisions dealing with GAO's strengthened role to be unconstitutional. The Department of Justice dutifully wrote opinions declaring that the act was unconstitutional. Although the act had been passed with overwhelming bipartisan support, and although counsel for the Clerk of the House, the Senate, and General Accounting Office prepared careful opinions explaining the constitutionality of the statute, the Department of Justice refused even to admit that there were arguments in support of the statute.

Instead, Attorney General William French Smith wrote the Speaker of the House on November 21, 1984 that, in effect, there were no reasonable arguments to be made in defense of the statute. Attorney General Smith also pronounced that no private contractor whose contract had been withheld under the law could challenge it. Accordingly, he indicated that all federal contracting officials would be directed to disobey the statute. He said that such wholesale disobedience to the law "will best assure a rapid and definitive judicial resolution of these constitutional issues."

On December 17, 1984 the Office and Management and Budget implemented this pronouncement, with a directive to the heads of

all executive departments and agencies. It imposed the "Action Requirements" that "Agencies shall take no action ... based on the [challenged] provisions."

The Constitution Does not Allow
Executive Officials to take on the Judicial
Prerogative of Striking Down Acts of Congress

Under Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." This means that, in an appropriate case, the Judiciary can overcome the presumption of constitutionality applicable to an Act of Congress and decide that it is unconstitutional.

However, Marbury v. Madison did not say that it was "the province and duty of the Executive department to say what the law is." It has been one of the bedrock principles of our system that only the Judicial department has that power. No federal official -- not the President, nor any subordinate -- has it.

Yet now, the Justice Department has begun to claim that power. The Justice Department has begun arguing that "in the case of a conflict between the Constitution and a statute"--

meaning, when the Justice Department decides there is a conflict" -- that "the President's duty faithfully to execute the laws requires him not to observe a statute...." In other words, now, when the President does not want to observe an inconvenient statute, all he need do is get a supportive opinion from his Attorney General, and so long as he can get such an opinion, he need not "observe [the] statute."

This novel proposition equates the powers of mere executive officials, with those of the Judiciary. It would make hash of the fundamental Rule of Law that binds executive officials to obey duly enacted statutes until the Judiciary says otherwise. As the Supreme Court has explained: '

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

United States v. Lee, 100 U.S. 196, 220 (1882).

The rule that no executive official can decide for himself what laws he is bound to obey, but must await decisions of the Judiciary and until then must obey the laws, has deep roots in our constitutional history. During the reign of absolute British monarchs, the notion that the Executive -- i.e., the King -- could decide for himself, without a decision of the courts, which laws should be

obeyed, was put to the test. After the Restoration, King James II attempted to claim such authority, but the English people would no longer tolerate such a claim, and their judicial system rejected it in the historic Seven Bishops Case of 1688.^{5/}

Shortly thereafter, James II was forced into exile in the Glorious Revolution of 1689, and the English Bill of Rights was enacted. The first article of that historic charter of freedom declared "That the pretended power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal."^{6/}

Scholars have concluded that the "faithful execution" clause of our Constitution is a mirror of the English Bill of Rights' "abolition of the suspending power"^{7/}, that is, the abolition of what the English Bill of Rights had called "the pretended [Royal] power of Suspending ... the Execution of Laws."

^{5/12} How. St. Tr. 183, 377 (1688). In that case, English bishops who rejected King James II's claim of authority were tried for seditious libel. Two Judges of the King's Bench rejected the King's claim, and the jury so found, acquitting the defendants.

^{6/} W. & M., Sess. 2, c. 2 (1689).

^{7/} Reinstein, An Early View of Executive Powers and Privileges: Trial of Smith and Ogden, 2 Hastings Con L. Quart. 309, 321 (1975); see Stewart, The Trial of the Seven Bishops, Cal. St. Bar. J. Feb. 1980, at 70 (account of case).

In fact, the Constitutional Convention in 1787 expressly rejected the attempt to re-introduce some power for the President to decide to suspend the execution of laws.^{8/} Instead, the Framers imposed on the President the duty "to take care that the Laws be faithfully executed."

There is not a shred of support in the records of the Constitutional Convention, or the history we have described, to support the Justice Department's argument, that the "faithful execution" clause was intended to allow the President the have the power of the Judiciary -- to decide for himself whether he considered laws unconstitutional, and if he felt so, to refuse to obey them. That view of Executive supremacy over the laws runs contrary both to the historic derivation of the "faithful execution" clause, and to the Constitutional Convention's stated decisions.

If the Framers had intended to give the President any such awesome power of deciding the constitutionality of laws as they gave to the Judiciary, there surely would be a clear record of it. Yet Alexander Hamilton, who discussed in

^{8/} A proposal was made in the constitutional convention "that the national executive have a power to suspend any legislative act" The Convention rejected the proposal, after Elbridge Gerry observed "that the power of suspending might do all the mischief dreaded from the nevasive of useful laws [i.e., the President's veto], without answering the salutary purpose of checking unjust or unwise ones." IV J. Elliott, Debates in the Federal Convention (2d ed. 1836).

detail the authority of the Judiciary to decide the constitutionality of laws, provided no such discussion of the supposedly equivalent Presidential power.

Any possible doubt about the matter, if there could be any, was resolved in the historic case of Kendall v. United States, 37 U.S. 912 Pet.) 524 (1838). There, a Cabinet Member claimed that because he was subject to the President, who, in turn, supposedly derived a vast power from the "faithful execution" clause, he was not bound by the laws.

The Supreme Court utterly rejected any such argument of Executive supremacy. The Supreme Court said that "to contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."^{9/} That Court harkened directly back to the classic language of the English Bill of Rights, and the Framers in the Constitutional Convention, in rejecting Executive power to "forbid [the] execution" of the laws.

In rejecting the Executive's argument, the Court explained that the effect of such power would be the

vesting in the President [of] a dispensing power, which has no countenance for its support, in any

^{9/38} U.S. at 613.

part of the constitution; [such an argument is] asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.

38 U.S. at 613 (emphasis supplied).^{10/}

OMB's Directive Is a Nationwide, Government-Wide Instruction Not to Obey the Law -- not a "Test Case"

In most situations, the proper course for the President, or an executive official, to obtain from the Judiciary a decision on the constitutionality of a law, is to await the action of an aggrieved individual to file a proper lawsuit against the government or otherwise, and for the Department of Justice to defend the Act of Congress. Then, if the

^{10/}A similar early ruling in United States v. Smith and Ogden, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806), proclaimed:

The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that ... will not meet with any supporters in our government.

The court summed up:

In this particular, the law is paramount. Who has dominion over it? None but the legislature....

Id.

Judiciary decides against the defense made of the Act, and strikes the Act down, the presumption of constitutionality has ended, and the official is no longer bound by the law.

On rare occasions, where the President believes that the Act of Congress invades his constitutional powers, the Department of Justice has wished not to defend the Act in the views it expresses to the courts, but to attack the Act. We have grave doubts about the way the Justice Department's pursuit of such a course.^{11/} Yet even on those rare occasions, the context has usually not been one of disobedience to the Act of Congress. Rather, the sound course has been for the President or executive official to obey the law, and to present his views to the Judiciary. Then, if -- and only if -- the Judiciary pierces the presumption of constitutionality which binds the executive official, and declares the law unconstitutional, is the President then freed from the binding nature of the law.

^{11/}We have considerable doubt as to the wisdom and propriety of such presentations of views. Among other reasons, it is too easy for the Executive, as discussed below, to seek to aggrandize its powers; to give too little heed to presumption of constitutionality; to give vent to political will rather than concern for the Constitution; and to place a burden on the Congress to intervene in court cases and litigate, when that burden more appropriately should be shouldered by the Department of Justice. However, that is a matter to be discussed at another time. The subject of this hearing is not a mere presentation of views to the court by the Executive, but an order from OMB not to obey the law.

For example, in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983), the Executive Branch took the view that the legislative veto in the Immigration and Nationality Act was unconstitutional. However, that did not lead the Justice Department, which has responsibility for that law, to refuse to obey it. On the contrary, the Justice Department, through its Board of Immigration Appeals, "held that it had 'no power to declare unconstitutional an act of Congress,'" id. at 2772.

The Department of Justice obeyed the legislative veto of Mr. Chadha's request for citizenship. Understanding its duty, it carried out the law even while presenting its views to the Judiciary that the law was unconstitutional. The courts had no difficulty resolving the case on this basis. They ultimately ruled that the legislative veto was unconstitutional. Only after the courts had so ruled, was the Justice Department released from the binding presumption of constitutionality -- and only then did it cease obeying the statute.

Most of the examples mentioned by the Justice Department to justify its action fall into this pattern.^{12/} It mentions

^{12/} United States v. Lovett, 328 U.S. 303 (1946) (executive obeys funding cut-off and refuses to pay employee Lovett; Justice Department meanwhile presents its view to the courts that the funding cut-off was unconstitutional; court agrees and releases (footnote continued)

three disputes in the 1950s and 1960s over provisions for "committee vetos," similar to legislative vetoes. Yet in two, Presidents Kennedy and Johnson found ways to express their views, without taking up the doctrine of Executive showing their displeasure -- a method similar to the expression of views to the Judiciary in Chadha. They testified against the laws at Congressional hearings. They declined to exercise some discretionary authority to avoid a clash. But they did not put forth the menacing doctrine stated here by the Justice Department -- that it can decide, like the Judiciary, what laws are unconstitutional, and thus which laws the President need not obey.^{13/}

The Justice Department cites an aberrational view taken during President Eisenhower's years -- a temporary assertion that certain provisions could "be regarded as invalid by the

executive from cut-off); Buckley v. Valeo, 424 U.S. 1 (1976) (Federal Election Commission carries out its statute; Justice Department meanwhile presents its view to the courts that certain provisions of the statute were unconstitutional; court agreed and struck those down, while retroactively validating pre-decision acts of the Commission).

^{13/} Public Papers of the Presidents: John F. Kennedy 6 (1963) (construing a provision narrowly as a Congressional "request for information"); Public Papers of the Presidents: Lyndon B. Johnson, 104, 1250 (1963-64) (opposition to committee vetos). The full story of such disputes was discussed in hearings under the notable chairmanship of Senator Sam Ervin, subsequently chairman of the Watergate Committee. See Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967).

Executive Branch."^{14/} This example proves peculiarly well the reasons against any such assertion of power for the the full story is quite another matter. For one thing, President Eisenhower swiftly compromised with the Congress on this issue, avoiding an outright clash.^{15/}

But more important, their example shows where such assertions of Executive supremacy lead. For having tasted the fruit of such unbridled power, the White House resorted to it again, in 1960, as a means of covering up scandal in a

^{14/} Public Papers of the Presidents: Dwight D. Eisenhower, 689 (1955).

^{15/} As the committee veto dispute continued, Congress passed a bill with another such provision. The bill said that contracts for family housing at military installations would not be entered into until the Defense Department "has come into agreement with the Armed Services Committees." (Section 219 of H.R. 9893, 84th Cong., 2d Sess. (1956)).

President Eisenhower vetoed the bill, but indicated that an alternative procedure would be acceptable. (Message from the President of the United States Returning Without Approval the Bill (H.R. 9893) ..., H.R. Doc. No. 450, 84th Cong., 2d Sess. 2 (1956)).

Congress then reenacted the bill, with a provision saying that such contracts would not be entered until the Defense Department "has submitted to the Armed Services Committees ... a written report ...; and a one hundred and eighty-day period has elapsed ... or the committees have advised the Secretary of Defense, in writing, that there are no further questions." Section 419 of H.R. 12270, 84th Cong., 2d Sess. (1956), as enacted, Pub. L. No. 84-968, 70 Stat. 991, 1018-19.

Then, President Eisenhower conceded and signed this bill without objection, and the controversy ended.

If this is the Justice Department's precedent for an OMB directive for nationwide disobedience to the Competition in Contracting Act, it is resorting to far-fetched analogies indeed.

Latin American loan program. Congress had insisted on the release of documents being covered up, by providing by statute that if the key documents were not released, funds for the program would be cut off. The White House refused to release the documents, and refused to obey the law, claiming it was not bound to.^{16/} It obtained an opinion of the Attorney General to back it up.

As Clark Mollenhoff, the respected investigative reporter who looked into the matter, described, Congressional hearings were then held which "revealed malodourous details of incompetence, conflicts of interest laxity, and illegal diversion of funds."^{17/} The White House was so embarrassed at this that the new President -- President Kennedy -- abandoned the previous position and released the documents.^{18/}

That eliminates the claim that Presidents can issue general instructions not to obey the law. What it leaves are the truly rare situations that arise perhaps once in a score of years, if not even less often than that, when there is a

^{16/} Public Papers of the President Dwight D. Eisenhower 881 (1960).

^{17/} R. Berger, Executive Privilege 16: A Constitutional Myth 240 (1974), citing Clark Mollenhoff, Washington Cover-Up 184, 187-89 (1962).

^{18/} Id.

challenged Act of Congress but no prospect whatsoever for a ruling by the Judiciary on it unless the President breaks the law. In these rarest of situations, the law has been broken to create individual, narrowly focused test cases of the law.

For example, twice Presidents have tried to fire quasi-judicial officers despite statutes protecting their independence. The only way to have a test case of such a statute is to fire such an official. In the 1930s, one such case occurred, and in the 1950s, another such case occurred. The Supreme Court upheld both laws and rejected both firings.^{19/}

Obviously, a situation where the President must break a statute, in order to test it, is a highly regrettable spectacle and dangerous for the Rule of Law. Fortunately, it is virtually never necessary, and it has some clearly visible delineations. The particular law must be one which everyone agrees cannot be tested any other way. The particular test example must be one specific, isolated incident, the results

^{19/} Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958). Also, Presidents have sought to test laws protecting the tenure of the Secretary of War -- the dispute which led to the impeachment trial of Andrew Johnson -- and a patronage employee, a local postmaster -- the dispute which led to Myers v. United States, 272 U.S. 52 (1926). The Justice Department has come up with no more examples of test cases than this, in looking over two hundred years of the resolution of constitutional issues.

of which can be dealt with in a single case. The public should at all times be protected from the alien and frightening prospect of the Executive branch declaring itself not to be bound by the law, by executive officials continue to obey the laws during the test case.

There is no comparison between such narrowly defined test cases, and the situation here. Here the Office of Management and Budget has used its awesome powers to issue a sweeping, nationwide instruction to all contracting officers not to obey the law. The instruction will affect, simultaneously, many billions of dollars of procurements. The number of contractors affected will number in the hundreds, if not thousands.

Moreover, there is absolutely no basis for the contention that this is the only way to test the statute. In fact, this statute could easily have been tested in the normal way. The statute stops for a time the award of a contract to a particular contractor, while the GAO decides a bid protest. Obviously, that contractor can go to court and, in a proper case, test the statute. The Justice Department never even waited to see if a contractor would do so. Yet in the very first confrontation -- the one in federal court in California -- the contractor aggrieved by the statute has gone to court. Rather than asserting the incredible doctrine

of Executive supremacy, the Justice Department could have gotten the court case it desires just by obeying the statute and letting such a contractor sue.

The fact of the matter is that the Justice Department's claim -- that this OMB directive was the only way to test the statute -- is a mere fig leaf covering the assertion of the doctrine of Executive supremacy. Having now made the grandiose assertion that when the President does not want to obey a statute, he does not have to, the Justice Department can be expected to attempt to enlarge the precedent whenever it does not like a statute.

Where will the Claimed Executive Power Lead?

The consequences of this doctrine must not be underestimated. It is one thing to have the fate of statutes decided by the Judiciary -- by an independent group of jurists, not personally interested in any case nor tied to the parties, confined by procedure and precedent, and subject to the traditions established by two centuries. Moreover, in judicial cases, before there is any decision, those supporting the Act of Congress will, hopefully, have the opportunity to present all possible arguments in its favor, and have them weighed neutrally and with the option of

appeal.

It is quite another thing for the fate of statutes to rest in the hands of the Attorney General. He is generally a political associate of the President, placed in that position because he is expected to be supportive, and capable of being removed at any time if he is not. He shares the ideological bent of the particular Administration rather than the long-term precedents which control the courts. Moreover, he need not hear from the affected individuals, the supporters of the law in Congress, scholars, or anyone else other than the internal bureaus of the Department of Justice, with their own agendas, before making a decision.

For these reasons, the Rule of Law indicates that this Committee should reject the doctrine of Executive supremacy, and should refuse to recognize as legitimate the OMB directive instructing the procuring officers of the government not to obey the law.

Mr. TIEFER. Thank you, Mr. Chairman and members of the committee. I will touch briefly on what the sequence of events was concerning the Competition in Contracting Act, and then on what the controversy before this committee is concerning the new assertions of power by the Justice Department and the OMB.

Last May, this committee reported the Competition in Contracting Act, which was subsequently enacted by the Congress. The problem that the committee faced was that over \$100 billion a year in procurement was occurring noncompetitively, much of it by sole-source methods at exorbitant prices.

As part of a coordinated effort to reduce this level of noncompetitive procurement, the committee provided for a strengthening of the GAO's bid protest system. And specifically, it said that when an award of a contract is challenged as illegal, the contracting officer should not go ahead with the award of the contract until the GAO can make a recommendation.

Even with that limited constraint that the act imposed on contracting officers, the act left a waiver provision. If the agency makes a finding that it is urgent and compelling to go ahead, it can still go ahead with the contract. That is what the Competition in Contracting Act says.

Now the Justice Department, following the instructions of the President, declared this provision unconstitutional. And the Office of Management and Budget then said that since the Justice Department had declared it unconstitutional, no one should follow it.

Let me address the specific powers now being claimed by the Justice Department and OMB. The Justice Department claims here today that: "In case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the laws requires him not to observe the statute."

Now what that means is that when the Justice Department decides that there is a conflict between the Constitution and the statute, the President and his subordinates will not obey it—will not obey the law.

In other words, when the President does not want to observe an inconvenient law, all he needs is an opinion from his Justice Department, and he no longer needs to obey the law.

The Office of Management and Budget has now claimed the power to tell executive officials not to obey the law, in advance of any decisions. The OMB has claimed the binding power in its December 17 directive to impose what it called action requirements. And the action requirement is: "That the agency shall take no action based on the challenged provisions."

The Justice Department decides, the OMB implements, and the statute is nullified. These new powers are completely at odds with the constitutional framework under which this Government has operated for 200 years.

In 1803, Chief Justice Marshall in *Marbury v. Madison* declared that: "It is emphatically the province and duty of the judicial department to say what the law is." He did not say that it was the province and duty of the executive department to say what the law is.

It has been one of the bedrock principles of the law since then that only the judicial department has that power to declare statutes invalid. No Federal official, not the President or any subordinate can pierce the presumption of constitutionality that surrounds an act of Congress.

This bedrock proposition that all executive officials must obey the law until a court says otherwise has been repeatedly expressed. The Supreme Court said in *United States v. Lee*:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All of the officers of the government from the highest to the lowest are creatures of the law and are bound to obey it.

The Constitution incorporates the specific command in the faithful execution clause that says that the President shall "take care that the laws be faithfully executed."

We address in our written statement in some detail the background of that clause which has no basis for an assertion that the President can override statutes. And the Supreme Court has specifically said so.

In *Kendall v. United States* when the executive made the claim of executive supremacy of the type that it is making here, the Supreme Court said:

To contend that the obligation imposed on the President to see that the law is faithfully executed implies a power to forbid their execution is a novel construction of the Constitution and entirely inadmissible.

It went on to say that, "Vesting in the President a dispensing power has no countenance for support in any part of the Constitu-

tion." And it pointed to the obvious consequence of such a power. "It would be clothing the President with a power entirely to control the legislation of Congress and paralyze the administration of justice."

Now what is outrageous here is not that the Justice Department is asserting the view that an act of Congress is unconstitutional. They have presented such views to the court before, just like they occasionally present to the committees of Congress the views that statutes should not be enacted or should be repealed.

What is not outrageous is even if they had set up a test case—although we have grave doubts about the appropriateness of setting up a test case—but if we were dealing with a notion that one official had to be fired or one contract had to be awarded because there was no other way to test the statute, that would be a separate question. We do not have that here today.

What we have is the assertion that the Justice Department has already decided that the statute is unconstitutional, and the OMB has already acted in advance of any court ruling to instruct all of the contracting officers handling billions and billions of dollars of procurement throughout the Government that they do not have to obey the law.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you very much for a delightful analysis of a history that goes back to 1688, almost three centuries of freedom from dictatorship. The Anglo-American political policies have tried to maintain this freedom for elected officials and representatives of the people not for the monarchy.

I have a few questions, and you can handle them jointly or any way you see fit, Mr. Tiefer.

Would you respond to the assertions made by the Justice Department that their advice to ignore the law will result in a more rapid judicial resolution of these issues?

Mr. TIEFER. Mr. Chairman, that assertion is without merit.

Had the executive branch obeyed the law, they were sure to get a test case. The situation that the Competition in Contracting Act sets out is that a contract which was going to be awarded to a particular contractor is stayed for a period of time.

Those contractors have their lawyers. Those contractors go to court to sue on a regular basis. It was a certainty that if a \$100 million contract was being withheld, or a \$50 million contract was being withheld, that they were going to go to court to challenge the law.

Now, the Justice Department has bollixed the situation up by this nationwide order not to obey the statute, which means that even if we have a judicial decision in one district, we do not know what the situation is going to be in the rest of the country.

The fact that you could have gotten a test case has been further clarified by the fact that in the particular Lear-Siegler situation that was previously mentioned, the case that is now going on in California, the contractor whose contract is being stayed has done exactly what I just said.

He has gotten his lawyers, and his lawyers are going to court.

Mr. BROOKS. What is your view of OMB Director Stockman's assertion that he has the authority to order Federal officials to violate the Competition Act?

Mr. TIEFER. The Office of Management and Budget was created by an act of Congress in 1921. That is when the Bureau of the Budget was created. Since then there have been statutes amending its basic charter.

The Office of Management and Budget has the powers that Congress gives it. If there was a provision in title 31 of the United States Code that gave it this power, we would have heard about it. If there was a previous instance in which they had issued one of these sweeping orders, a nationwide declaration that the law was not to be followed, we would have seen that order.

Let me give a particular example of the fact that OMB's powers are confined to its charter.

In 1973 and 1974, this committee faced the situation that OMB was claiming that it did not have to testify before Congress; it did not have to respond to demands for information from Congress.

You, Mr. Brooks, introduced a statute that was going to abolish OMB temporarily and then re-create it, hopefully in a form that would be more responsive to congressional requests for information.

Hearings were held before this committee, entitled "Confirmation of the Director and Deputy Director of the Office of Management and Budget." The bill that you introduced with modifications was passed by the two Houses; President Ford vetoed it; but a new version was then passed and signed by the President, which specifically provided for the first time that the Director and Deputy Director of OMB would have to be confirmed by the Congress, implicitly meaning they would also have to respond to requests for information.

That is why the Director of the OMB and the Deputy Director of OMB were here today, because their powers are described by the law written by the Congress.

Mr. BROOKS. The President appreciates your research of that effort of ours some 10 or 11 years ago. We were just assuring that this Government remains responsive to the people. You can see the necessity.

Mr. TIEFER. Very clearly.

Mr. BROOKS. The President claims that he has the power to unilaterally declare a portion of a public law unconstitutional and refuse to enforce it. Left unchallenged, how could this newfound power be used?

Mr. TIEFER. Let me give some examples of the unlimited bounds of this power.

The new Attorney General, Edwin Meese, it is safe to say, does not like the provision in the Ethics in Government Act providing for the appointment of special prosecutors.

The Justice Department has previously said that it considers this provision unconstitutional, but it has obeyed the provision. Although it considered it unconstitutional, it has repeatedly gone to the courts and said, "Appoint special prosecutors." That is why there was a special prosecutor for Mr. Meese.

Now, all that he needs to do is get an opinion from the Justice Department that the act is unconstitutional, and for the next 4 years, no matter what kind of high-level wrongdoing there is, he will not have to appoint any more special prosecutors.

Let me give a second example. The Office of Management and Budget does not like the Impoundment Control Act, because it limits their ability to impound funds.

Impoundment of funds are tested under that statute by the GAO.

Now, we have already seen in this particular case the Justice Department's views that giving any sort of power whatsoever to the GAO is unconstitutional.

Up until now, although they had this view about the Impoundment Control Act, that it had unconstitutional provisions, they have obeyed the Impoundment Control Act and have not impounded for 10 years.

Now, all they need to do is get an opinion from the Department of Justice that the Impoundment Control Act is unconstitutional, and they can start impounding again.

If they do not like the Legal Services Corporation, they can impound its funding.

If they do not like food stamps—maybe even if they do not like Social Security payments, they can impound those.

I could go on to use examples, Mr. Chairman, because the list of statutes that the executive branch does not like is very long, and their ability to come up with constitutional arguments is very great.

Mr. BROOKS. What did they finally do to King James II?

Mr. TIEFER. They kicked him off the throne in the glorious revolution and passed the English Bill of Rights forbidding any further actions such as the ones he had taken.

Mr. BROOKS. What can Congress do to ensure that the President fulfills his constitutional duty to faithfully execute the laws?

Mr. TIEFER. Earlier this week, on Monday, the Justice Department filed its views in California that this act is unconstitutional, and, as you know, Mr. Chairman, the next day, at your request, the bipartisan leadership of the House of Representatives agreed to go to court with you.

Yesterday, pursuant to those instructions, we filed our 52-page brief in court, in defense of the act of Congress.

Now, there are further steps that can be taken: The type of steps that were taken 10 years ago when the Office of Management and Budget began asserting authority that did not belong to it.

There is ultimately the power of the purse. For example, one could simply forbid the further expenditure of funds by the Office of Management and Budget to implement these unconstitutional actions that it is taking.

But those steps remain for the future. I think, for now, the contracting community and the legal community are looking to see what position this committee is going to take about the newly asserted powers, and once this committee has decided on its position, that will have great weight.

Mr. BROOKS. Thank you.

Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

You were here when the Director of OMB testified, were you not?

Mr. TIEFER. Yes, Mr. Horton.

Mr. HORTON. When I asked the question as to whether or not this had occurred in the past, he indicated what authority he thought they had for taking this type of action. He thinks that the *Chadha* decision made a difference, allowing the executive branch to declare a number of acts unconstitutional. Can you compare the situation involved in *Chadha* with what is involved here?

Mr. TIEFER. Yes, Mr. Horton.

Let me describe exactly what happened in that case.

In *Chadha*, the executive branch said that its view was that the legislative veto was unconstitutional. This, by the way, was a position that they had gone back and forth on. In 1977, as Mr. Brooks may recall, the Attorney General, who is quite flexible when asked for opinions, said that the legislative veto in the Reorganization Act was constitutional.

This was at a time when Mr. Brooks was saying it was not. Mr. Brooks' views prevailed in the end. Now, they have turned around and said, "Mr. Brooks, after the decision confirming his views, is writing legislative vetoes into the law."

Be that as it may. The Justice Department, although it took the view that the legislative veto was unconstitutional, obeyed the legislative veto. The legislative veto in that case said Mr. Chadha was not to be allowed citizenship. He was a deportable alien. Congress vetoed the INS proposal giving him citizenship.

The Board of Immigration Appeals said, "We have no power to declare an act of Congress unconstitutional. We will obey it."

Then, Mr. Chadha went to court; the Justice Department presented its views; the Supreme Court reached its verdict; and only after the Supreme Court said that the law was invalid did the Justice Department then say, "Now, we are released from the binding effect of the act; now, we can grant citizenship."

Mr. HORTON. Is that authority for them to take the action that they took in this instance—which had not been taken before—in declaring a portion of a bill that was signed into law by the President unconstitutional?

Mr. TIEFER. No, sir, it is not. It is authority for exactly the opposite. They should obey the law until a court of competent jurisdiction has said otherwise.

Mr. HORTON. Well, let me ask you, from your experience and your study, can you tell us whether or not there has ever been another instance in which the Attorney General has declared an act unconstitutional, or portions thereof unconstitutional, and directed that administrative agencies not comply?

Mr. TIEFER. There have been isolated instances, usually of the test case model that I just stated, where the only way to test a law is to fire one person, and thereby set up a test in court.

There has never been a directive like this throughout the Government from OMB that tens of billions of dollars are going to be procured in violation of the statute.

In fact, when the Justice Department gave a list of the examples that it considered precedents for what it was doing here to Chairman Rodino of the Committee on the Judiciary, it cited the League

of Women Voters case where the Attorney General had written a letter to the Congress.

Let me quote the Attorney General's letter: "Reasonable arguments cannot be advanced to defend the challenged statute."

That is the position he is taking on this statute as well: that no reasoned arguments can be advanced to defend this statute.

In that case, the Congress went to court; it not only advanced reasoned arguments for the statute, the court dismissed the challenge. That is, the court saw, not just that there was something to say in defense; it saw the defense was overwhelming; and what the court said in that case, which is cited by the Justice Department as a precedent—this is *League of Women Voters v. California*, 49 F. Supp. at 521:

"This suit is flavored by a sub silentio prayer by the Executive Branch for action by the Judicial Branch that it cannot take itself."

The court meant that the executive branch cannot take itself action to decide an act of Congress is invalid. The example they cite is the judicial ruling to the opposite effect.

Mr. HORTON. What I am trying to determine is whether or not this is a new step taken by the Attorney General, and whether or not there are constitutional decisions made by the Supreme Court that would justify the administration's taking this unusual step?

Mr. TIEFER. No, Mr. Horton. There is no comparable precedent for an order in the Justice Department implemented by an OMB directive that a law shall be disobeyed.

Mr. HORTON. In other words, this is an extension of the executive's powers.

Mr. TIEFER. This is a wholly new extension of the executive's powers.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Yes.

Mr. BROOKS. Let me put one more question in the record. You can answer it for the record if you wish.

The Justice Department has cited several instances when past Presidents have issued statements that they would not comply with the legislative veto provisions in the law.

Are there instances or precedents for the executive actions in this regard? Do you want to file that for the record or can you do it off the top of your head? You are pretty good at it, but I do not want to strain you.

Mr. TIEFER. Mr. Chairman, I have with me the relevant messages of Presidents Kennedy, Johnson, and Eisenhower, but it would take a while to get to it.

Mr. BROOKS. All right. You do that for the record.

[The material follows:]

THE JUSTICE DEPARTMENT'S ASSERTED "PRECEDENTS"

During the hearing, Chairman Brooks asked us to address the Justice Department's citation, as authority for the OMB Directive at issue, of the positions of past Presidents regarding legislative vetoes.

For the reasons discussed below, those positions provide no support for OMB's usurpation of a power belonging to the Judiciary alone: the power to decide the constitutionality of statutes.

The Case of INS v. Chadha Indicates that the Executive has
"No Power" to Declare Acts of Congress Invalid

The Supreme Court gave its authoritative treatment to the precedents regarding the legislative veto in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983). As the Court noted, Presidents had frequently taken the position in bill signing statements that legislative vetoes were unconstitutional. "[E]leven Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge Congressional vetoes as unconstitutional." 103 S. Ct. at 2779 n.13. Similarly, in the Chadha case itself, the Department of Justice took the position all the way to the Supreme Court that legislative vetoes were unconstitutional.

However, the issue before the Committee is not the Executive's merely articulating a position, in bill signing statements or arguments to the courts, that a provision is unconstitutional. Such positions, troubling though they are, pose a separate problem. The issue here is whether the Executive can make and implement decisions invalidating an Act of Congress, as the OMB Directive purported to do, prior to any judicial decision.

Chadha itself distinguishes sharply between mere position-taking, as in bill signing statements, and actual decisions that statutes are invalid, the power reserved to the Judiciary alone. The Supreme Court noted that even as the Executive took the position that the legislative veto was unconstitutional, it obeyed the provision (until a court of competent jurisdiction declared it invalid). The Court noted that the INS's immigration officer (titled an "immigration judge") "held that he had no authority to rule on the constitutional validity of § 244(c)(2);" on appeal from that officer, that the INS Board of Immigration Appeals "held that it had 'no power to declare unconstitutional an act of Congress.'" 103 S. Ct. at 2772 (emphasis supplied). "[T]he INS concluded that it had no power to rule on the constitutionality of that order and accordingly proceeded to implement it." Id. at 2773 (emphasis supplied).

Thus, although "the INS presented the Executive's views on the constitutionality of the House action [i.e., the legislative veto] to the Court of Appeals," "the INS brief to the Court of Appeals did not alter the agency's decision to comply with the

House action." Id. at 2773 (emphasis supplied).

The Deputy Attorney General's statement to this Committee implicitly concedes how Chadha undercuts his argument. He argues that "the Chadha court never suggested that there was any impropriety in the President's conduct in contesting acts of Congress he believed infringed on his constitutional prerogatives." Statement of Deputy Attorney General Jensen at 21. Of course the Chadha court never suggested such "impropriety in the President's conduct" -- because the INS obeyed the law. It properly conceded it had "no authority" and "no power" to do otherwise. It properly declined to assert the claims of Executive supremacy put forth here. It did not cross the line, beyond position-taking, that OMB did here, to usurping the authority and power to decide that an Act of Congress was invalid.

Bill signing statements

Faced with Chadha, the Justice Department has reached for support to the Presidential signing statements cited in Chadha on bills containing legislative vetoes. We address those signing statements below, but first note the short answer regarding bill signing statements. Bill signing statements are merely symbolic presentations of positions. As the Supreme Court characterized them in Chadha, they are a way for the President to "go on record." They have no legal effect, as they are merely the President's explanation, like a speech or a press release, of why

he signed a bill rather than vetoing it. A signing statement is no precedent for an OMB directive which constitutes, not merely the taking of a position, but imposition of what OMB terms "Action Requirements," followed by regulations issued thereunder, purporting to bind all executive officers and to relegate an Act of Congress to the status of a nullity.

Moreover, even if there were real precedents -- prior OMB directives like this one -- they would hardly prove that the Executive Branch had the power asserted therein. Assertions by the Executive Branch of power do not prove the existence of power. The Supreme Court decisions discussed in our testimony before the Committee state the authoritative Judicial view of the "faithful execution" clause, which utterly rejects the power claimed by OMB.^{1/} Only the courts, and particularly the Supreme Court -- not the Justice Department nor the President -- can overthrow that prior doctrine. Even if there were a hundred OMB directives declaring laws invalid -- and there has never before been even one -- they would still merely be that many illegal usurpations unless and until the Supreme Court changed its view of the "faithful execution" clause.

Turning to the positions taken in the three bill signing statements cited by the Justice Department, the statements of Presidents Kennedy and Johnson indicate at once no assertion of

^{1/}"[T]o contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." Kendall v. United States, 37 (12 Pet.) 524, 613 (1838)(emphasis supplied).

the doctrine of Executive supremacy was being made. President Kennedy merely put his views on record that the legislative veto was unconstitutional. He stated that he "ha[d] been advised by the Attorney General that this [legislative veto] provision is unconstitutional," that "[p]revious Presidents and Attorneys General have objected to similar provisions," and that he "concur[s] in these views." Public Papers of the Presidents: John F. Kennedy 6 (1963). Thereupon he construed the provision narrowly, by deciding "to treat this provision as a request for information." Id. He did not expound an Executive supremacist view of the "faithful execution" clause; he did not claim the power to declare the statute unconstitutional; he only claimed the ability to "treat this provision" narrowly.

Similarly, President Johnson, in a bill signing statement, noted "the position taken in similar cases by President Eisenhower, President Kennedy, and by myself," regarding legislative vetoes. Public Papers of the Presidents: Lyndon B. Johnson 1250 (1964). Like President Kennedy, he went on record against them. Also like President Kennedy, he construed the relevant provision narrowly, as requiring "the Congress to be informed and to be consulted ... and I am directing that executive offices see that this is done." Id. Accord, id. at 104 (construing statute narrowly).

Obviously, both Presidents were stating vigorous opposition to the legislative veto. Both were giving narrow treatment to the relevant provisions. However, neither invoked the grand claim of Executive supremacy implemented here. Neither expounded

a view of the "faithful execution" clause giving them power to invalidate statutes. No OMB directives (or Bureau of the Budget directives or Executive orders) followed those bill signing statements. Although these statements represent the most forceful position taken by those Presidents, they represent only that -- position-taking -- rather than action to strike down an Act of Congress, which the Executive declined to take in Chadha even as it presented the same position as those Presidents.

President Eisenhower also expressed a position in the bill signing statement of his cited by the Justice Department. He asserted that certain legislative veto provisions could "be regarded as invalid by the Executive Branch." Public Papers of the Presidents: Dwight D. Eisenhower 689 (1955). However, that statement was all he said or did. He did not follow it up with an OMB directive or Executive order. He did not assert the Executive supremacist view of the "faithful execution" clause. Rather, President Eisenhower swiftly followed up his taking of that position by compromising on the issue, as documented by the inquiries of Senator Ervin's Subcommittee on Separation of powers.^{2/} And when President Kennedy came into office, he

^{2/} The Justice Department testimony before the Ervin committee listed the Administration positions taken on the legislative veto. It cited the particular position taken by President Eisenhower, quoting his statement that "such section will be regarded as invalid by the executive branch...." Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess. 219 (1967)(Justice Department testimony).

However, as that testimony conceded, President Eisenhower indicated shortly thereafter that an alternative procedure would be acceptable, when the issue arose on the military construction authorization bill. Id. at 220, citing H.R. Doc. No. 450, 84th (footnote continued)

disavowed even that view expressed by the Eisenhower Administration, as we discussed in our statement to the Committee.

Conclusion

In sum, OMB and the Justice Department claim an unprecedented power. The Executive Branch has never before implemented a view that the "faithful execution" clause gives the Executive Branch the power to invalidate laws. There has never been an OMB directive, or similar Executive instrument, purporting to invalidate an Act of Congress. What we now face is without historic parallel: a full-blown claim that the Executive Branch can add to its arsenal the most awesome power of the Judicial Branch.

Cong., 2d Sess. 2 (1956).

Congress then reenacted that authorization bill, with a provision saying that executive action would not occur until "a one hundred and eighty-day period has elapsed ... or the committees have advised the Secretary of Defense, in writing, that there are no further questions." Section 419 of H.R. 12270, 84th Cong., 2d Sess. (1956), as enacted, Pub. L. No. 84-968, 70 Stat. 991, 1018-19. This compromise allowed Congress to take the steps it considered necessary, while the President, in his compromise, then approved that version.

As the Justice Department itself concedes, "section 419 (70 Stat. 1018-1019) contained a 180-day waiting period which could be waived by the two Armed Services Committees," and "[t]he President approved this act." Separation of Powers Hearings, supra, at 220 (Justice Department testimony).

(footnote continued)

Mr. BROOKS. Mr. Horton?

Mr. HORTON. You have already indicated that there was a meeting of the House bipartisan leadership group a couple of days ago, and there was unanimous agreement that you will intervene on behalf of the chairman and myself, as ranking minority member, and on behalf of the bipartisan leadership in this case which is now pending in California.

You are going to intervene, and I assume in your brief you have asserted the defense of the constitutionality of the disputed provisions that are involved in this Competition in Contracting Act. But what I want to determine now is, will you frame the question so that it can be determined whether or not the President and the Attorney General have the authority to declare a portion of a statute unconstitutional, and then be permitted to direct the administrative agencies not to comply? Even if they determine if this act were constitutional or unconstitutional, they may not reach the question as to whether or not the administration can in the future take this type of action.

Mr. Ross. It is—I do not believe that it is a safe assumption to assume that the court would reach that broad a question. The court will have before it the question of the constitutionality of this particular act. It is unlikely that they would reach beyond that question to address the broader questions of the relationship of the Congress and the President.

The courts normally leave that to the Congress and the President to work out as the political branches will. The executive has demonstrated an ever-increasing proclivity to attempt to walk away from statutes which have been duly enacted.

This is not the sole instance in which they have done that. We have recently been participating in litigation arising out of the 1984 Bankruptcy Act Amendments in which the Department of Justice went to court to challenge the constitutionality of the provisions enacted by the Congress.

In that case, they also suggested that the statute was without constitutional basis; and to date there have been approximately six courts that have ruled on the question, all of which have upheld the constitutionality of the Congress' action.

I think that it is possible, that at some date in the future, a court may, viewing the actions of the executive with alarm, may choose to comment on it; but I think it much more likely given the way courts normally treat these questions that they would look to the Congress to respond strongly and sharply and to bring to task the executive for taking these actions.

I think they would look to hearings such as that being held today, and to actions by this committee, the Judiciary Committee, and the other competent committees of the Congress to call to the public's attention and to bring to bear the pressure that can be brought on the executive not to walk away from statutes, but to abide by the rule of law that has always prevailed in this Nation.

Mr. HORTON. I have one other question, and I do not want to get into the merits because we could be here all day if we got into that.

But I do want to ask this question with regard to the Comptroller General. In the past, the Comptroller General has performed

his bid protest function based on his statutory authority to settle Government accounts.

Is the bid protest function as now established in the Competition in Contracting Act any more intrusive on the functioning of the executive branch than the settlement of accounts function?

Mr. TIEFER. Mr. Horton, it is not only not more intrusive, it is decidedly less intrusive. The accounts settlement function involved General Accounting Office decisions that were deemed final and conclusive within the executive branch. That is, once the General Accounting Office said "This claim shall be paid," which is what they do in that function, the claim had to be paid, subject to judicial review, of course.

Here, they only make a recommendation. The statute says that when the GAO resolves a bid protest, it does so by making a recommendation; and if the procuring agency says, "Thank you for your recommendation; we are going to go ahead with our sole-source acquisition anyway," that is the end of the matter subject to judicial review.

So, it is less intrusive.

Mr. HORTON. Thank you very much.

Mr. ROSS. Mr. Chairman, if I could expound for one moment on one of our previous answers. You had asked, concerning the breadth of the claim made by Department of Justice and OMB, and I think during his testimony, Mr. Stockman very baldfacedly gave away the breadth of that claim.

He stated that if the executive had at its disposal the item veto that he would not be here today. Presumably, what he meant was if the executive had at its disposal the item veto they would not have had to use the Department of Justice opinion and OMB directive to avoid the application of the statute.

But the fact of the matter, and the fact of the Constitution is that the executive does not have an item veto.

Now, the wisdom of providing such an item veto to the President is one that is debated by constitutional scholars and there are floating proposals to amend the Constitution to provide the President with that power.

But, to date, neither the Congress nor the States have seen fit to provide the President with that authority. So, the fact of the matter is that the executive cannot arrogate unto itself those authorities that it wishes the Constitution had provided it with. It must abide by the Constitution as it is presently written, and must abide by the statutes as they are presently written.

Mr. BROOKS. Thanks very much. Do not leave. I want to ask that we recess the committee. I hope you gentlemen can stay for a moment to see if Mr. Saxton, Mr. Monson, and Mr. DioGuardi have any questions. In the meantime, I will recess the hearing while the members are here and reconvene the subcommittee, without objection, to consider two draft reports that we have pending.

[Recess taken.]

Mr. BROOKS. The hearing is reconvened.

Mr. MONSON, do you have any questions for the counsel?

Mr. MONSON. I would like to ask him the questions that I asked Mr. Stockman. Do you view the role of the Attorney General in the executive branch as being one of an advisory capacity, or are the

decisions or the opinions that he issues binding on the executive agencies?

Mr. ROSS. The Attorney General certainly does not enjoy the authority to unilaterally wipe a statute off the books.

The Attorney General clearly serves as the President's lawyer, and can render advice to the President. Whatever degree the various statutes creating agencies, whatever degree of control those statutes give to the President over those agencies, the President, pursuant to the advice that he receives from the Attorney General, can certainly direct his agencies to act in the way that he wishes, consistent with the statutes.

However, the overriding principle is that it must be consistent with the statute.

Mr. MONSON. Well, I appreciate that. Coming out of State government and working closely with an attorney general there, he never presumed to have authority to bind people to opinions that he issued, but merely to advise them on what course should properly be taken in his opinion. I wanted to see if there was a difference between the State level and the Federal level in that regard.

I would appreciate your comment, too, though, on the question that Mr. Stockman raised as to the location of the bid protest function in awarding costs. Your earlier testimony that the responsibility given the GAO was not binding shed new light on the issue for me. But would it have been better to locate that function within the executive branch?

Mr. ROSS. Let me defer to Mr. Tiefer, who has over the years developed quite a bit of expertise on the role of independent officers in the Federal Government, and has, in fact, written on that subject.

Mr. TIEFER. Thanks.

Mr. Monson, that question first arose in 1789 when the first Congress met. When James Madison came to the floor—he was then a Member of the House of Representatives, a freshman Member, of course—came to the floor of the House of Representatives and said, concerning the Comptroller of the Treasury, the great-grandfather of the Comptroller General, “We need an independent officer in this position. We need someone to check the claims against the Government. We can’t depend upon the executive people themselves to make decisions on claims against them that are fair enough. This is a quasi-judicial function,” he said.

The Supreme Court has quoted Mr. Madison’s statement in 1789. It has been implemented. Every State—we have a report from the Congressional Research Service, which I hope will be included in these hearings—every State has a provision of some sort of an auditor or comptroller who is independent.

[See appendix A, No. 5.]

Mr. TIEFER. The Federal Government is not alone. Every State does this; every major corporation does this. It is a necessity.

Mr. MONSON. I think you have started to answer the question, but I am not sure you went far enough for me.

Does the constitutional question that they raise have some validity, in your mind? I am not addressing whether or not the President should enforce the law that has been passed. I am asking whether

or not they have a legitimate concern about the constitutionality of the act.

Mr. TIEFER. So long as the statute provides that the decision of the General Accounting Office is a recommendation, which is what it does, we do not even have a major constitutional question.

If it were made binding, I would still believe that is constitutional, but we do not even have that question.

Mr. MONSON. I understand, and I appreciate that explanation. I just wonder, in view of that, though, have we accomplished anything if we still leave open the necessity of taking it to court to finally adjudicate it anyway.

Is that option not open without it going to the GAO?

Mr. TIEFER. If the Congress had failed to create the General Accounting Office and had failed to maintain consistently the notion of an independent check on the executive branch, we would not have what we have today, which is volume after volume of expert independent opinions which the courts themselves—not just the Congress and the executive agencies, but the courts have repeatedly said: “We rely on the expertise of the General Accounting Office. We refer questions to it. We give some deference to it.”

The courts themselves would be in the bind that they are not in today. They can rely on the General Accounting Office for general expertise as do all three branches. That is what the Congress has gained by having such an officer.

Mr. MONSON. I am not questioning the necessity of the officer; and I am not questioning the necessity of maintaining the independence of that office; and I am not questioning the intended goals that we’re trying to accomplish through passing the act. They all sound to me like they are very legitimate. I just want to make sure that giving the GAO the responsibility to review, without giving them the authority to bind a decision, accomplished anything. I wonder whether or not we have just added a procedure there that wastes time and perhaps incurs additional expense.

Mr. TIEFER. It is a fair question, sir.

The statute also provides that the decision, the recommendation of the General Accounting Office becomes a part of the record.

Now agencies, although they have the power not to follow that recommendation, must then face a situation that they have an independent expert opinion in the record, which says, “You made a mistake. You violated the law or regulations.”

Furthermore, if they fail to follow those recommendations, a report is made to Congress, and this committee has been vigilant over the years, particularly in the automatic data processing area, in following up reports from the General Accounting Office that there is waste and fraud and violations of the statutes and regulations in Government procurement.

Mr. MONSON. So then, what you are saying is that without this, the opportunity to go to court would not be nearly as strong.

Mr. TIEFER. I think that I would have to say that the committee’s judgments when it enacted this statute are thoroughly documented in its report and make eminent sense to me. It is not my function to question the wisdom of the committee, but its logic is laid out in its extensive report on the Competition in Contracting Act, and I consider it very sound.

Mr. Ross. And let me add—if the question is, does this act assure an improvement in Government contracting practice, I do not think that there is anyone who could give that as a legal opinion.

Mr. MONSON. Well, that was not my question, but it certainly is a good question to ask.

Mr. Ross. Clearly, the act represents the accumulated wisdom, not only of this committee and its counterpart in the Senate but also of years of study by independent commissions and represents a good-faith effort to improve Government contracting and to lessen the amount of fraud, abuse, and waste.

Mr. MONSON. But does it? Does it assist those that have legitimate claims in processing those claims, or is it another step that may be unnecessary?

Mr. Ross. It was viewed by the committee and the Comptroller General that it would assist those with valid claims and that it would improve the practice.

And certainly there is no evidence to the contrary.

Mr. MONSON. Thank you.

Thank you, Mr. Chairman.

Mr. BROOKS. Thank you, gentlemen, very much for your, I thought, splendid dissertation of the law and the precedents involved in this matter. I congratulate you on winning your last seven cases, and may you win the eighth with the same skill.

Mr. TIEFER. Thank you, Mr. Chairman.

Mr. Ross. Thank you.

Mr. BROOKS. The representative from the Department of Justice this morning is D. Lowell Jensen, the Acting Deputy Attorney General. He has served as Associate Attorney General since July of 1983. He has recently been appointed by the President to the No. 2 position at the Department. And may we congratulate you, counselor—or maybe we should call him a judge now, a justice, Mr. Justice, Supreme Court of Judges.

Your prepared statement will be made part of the printed hearing record, and you can proceed.

And, gentlemen, Mr. DioGuardi, I anticipate that at about 3 minutes after 11, we will have a vote on a very important matter—the journal of yesterday. We will continue until then. At the conclusion of that vote, we will be back here to complete the testimony of Mr. Jensen.

Mr. DioGuardi has the leadership desk, and I am very impressed with that. Mr. Michel is to be complimented on his judgment in selecting you. All right. If you do not go, they will never appoint you again.

I will accept your statement for the record, Mr. Jensen. You can proceed as you see fit. We are delighted to have you here, and appreciate it.

STATEMENT OF D. LOWELL JENSEN, ACTING DEPUTY ATTORNEY GENERAL OF THE UNITED STATES, ACCOMPANIED BY RALPH TARR, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. JENSEN. I thank you very much, Mr. Chairman, and I appreciate this opportunity to be here to discuss this issue with the subcommittee.

I may indicate that appearing here with me today, who could be of some assistance along the way, is the Acting Assistant Attorney General of the Office of Legal Counsel in the Department of Justice, Mr. Ralph Tarr.

I appreciate you——

Mr. BROOKS. Ralph what?

Mr. JENSEN. Ralph Tarr, excuse me, T-A-R-R.

Mr. BROOKS. Good, we are delighted to have you.

Mr. TARR. Thank you, Mr. Chairman.

Mr. JENSEN. As I indicate, I am happy to appear here today before you to discuss the Department's position with respect to the Competition in Contracting Act of 1984 [CICA], which was enacted as part of the Deficit Reduction Act of 1984.

As you know, when the President signed this legislation into law, he requested the Attorney General to inform the executive branch agencies regarding how to comply with the act in a manner consistent with the Constitution.

In response to this request, the Department has determined that Federal agencies should not execute certain bid protest provisions of the act.

The first provision requires a procuring agency to suspend or stay any procurement if a bid protest is filed prior to the award of a contract or within 10 days after the award. The provision then purports to authorize the Comptroller General to lift this stay of the procurement by issuing his decision on the bid protest.

The second provision purports to authorize the Comptroller General to make binding awards of attorney's fees and bid preparation costs to successful bid protestors.

Before I discuss these specific provisions, however, there are several points that I would like to make with respect to the Department's position on CICA.

First, I want to emphasize that the Department has no general objection to the bid protest procedures established by the CICA. To the contrary, we believe that the Comptroller General plays a very useful advisory role in the bid protest area, and we believe that his participation has been extremely helpful in resolving the bid protest disputes. Thus, we are happy to see the Comptroller General continue his review, and we have no objection to the explicit statutory authorization for this role that is set forth in the CICA.

Second, we are entirely sympathetic with the need, in some instances, to suspend or delay a procurement in order to resolve the legal questions raised by a bid protest. Because the executive branch is sensitive to the need for a stay in some circumstances, the Federal acquisition regulations [FAR] issued prior to the CICA, and the revised FAR provisions on bid protests, continue to provide

for the suspension of a procurement if a bid protest is filed prior to the award of a contract. Thus, although we do not believe that the Comptroller General may play a role in determining when a stay may be lifted, the executive branch has provided on its own a stay provision that substantially meets the concerns that motivated the stay provision in the CICA itself.

In explaining the Department's decision, I would like to discuss three general subjects.

Basically, the——

Mr. BROOKS. Counselor, we are going to recess until after this vote. We have a vote going right now.

Mr. JENSEN. Surely, Mr. Chairman. Whatever——

Mr. BROOKS. We will recess, and then we will return. I hope then that you can condense your statement. We have it all. We have read it.

Mr. JENSEN. I will go through that, yes, and I will see if I can condense it.

Mr. BROOKS. If you can do that, then we can ask you a few questions and, hopefully, get you back to the office by noon.

Mr. JENSEN. Fine.

Thank you, Mr. Chairman.

[Recess taken.]

Mr. BROOKS. This hearing is reconvened and the Chair recognizes the gentleman from the Justice Department, Mr. Jensen.

Mr. JENSEN. Thank you very much, Mr. Chairman.

I will try to, as I indicated, abridge this testimony as we go through it. I had indicated that there are three general subjects that I would like to address and they basically deal with the status of the Comptroller General as a part of the legislative branch of the Government and they deal with the substantive issues of constitutionality as to the CICA itself, and as to the Attorney General's decision with reference to the advice that this statute ought not to be executed.

The first issue in terms of the Comptroller General is that since the adoption of the Budget and Accounting Act of 1921 creating the position, the Department has taken a consistent position with respect to his power and authority. Because the Comptroller General is part of the legislative branch of the Government, the position of the Department has been that the Comptroller General may not bind the executive branch.

Consistent with this position, early in 1984 the Department received a request from this committee for comments on bid protest provisions similar to the ones finally adopted in the CICA that were then under consideration by the committee as part of H.R. 5184. The Department commented on and objected to the constitutionality of the two provisions that purported to give the Comptroller General the authority to bind the executive branch. That's a letter of April 20, 1984. I believe that the committee has that. We'd be happy to provide it if there is a need to do so.

Despite those comments as to the constitutionality, the provisions were ultimately adopted by Congress as part of the CICA which itself was made part of the Deficit Reduction Act. Although the President believed the two provisions of the CICA that empowered the Comptroller General to bind the executive branch to be

unconstitutional, he concluded that it would not be in the national interest to veto the entire Deficit Reduction Act because of these provisions. Therefore, the President noted in a signing statement his constitutional objections to these provisions and requested the Department of Justice to inform executive branch agencies how they might comply with the act in a manner consistent with the Constitution.

Thereafter, the Office of Legal Counsel prepared a memorandum which concluded that the two provisions purporting to vest the Comptroller General with authority to bind the executive branch were unconstitutional and recommended that these provisions not be enforced by the executive branch.

The Attorney General directed that this memorandum be distributed to the executive branch agencies responsible for implementing the provisions of the CICA. Subsequently, the Attorney General expressly adopted the conclusions of the Office of Legal Counsel in a letter sent to the Speaker of the House and the President of the Senate to inform Congress, as required by statute, of the Department's decision not to enforce the two unconstitutional provisions of the CICA.

The Attorney General also sent a letter to the Director of the Office of Management and Budget, dated November 21, 1984, which requested the Director to assist in ensuring compliance by all executive branch agencies with the legal advice provided by the Department of Justice concerning the CICA.

Subsequently, the Director of OMB issued a bulletin to the heads of executive departments and agencies setting forth procedures governing implementation of the CICA, which advised executive agencies to conduct their contracting activities in accordance with the Attorney General's legal advice.

The bid protest provisions of the CICA went into effect on January 15, 1985, and litigation has already been filed to test the validity of the Department's conclusions with respect to the unconstitutionality of the two bid protest provisions.

The next issue I would like to address is the substance of the Department's legal conclusion that the two provisions purporting to authorize the Comptroller General to bind the executive branch are unconstitutional. I've already stated that the Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921 and in that act it was expressly stated that the Comptroller General is independent of the executive department.

Subsequent legislation made it clear that the Comptroller General is part of the legislative branch. The Reorganization Act of 1945 specified that for the purpose of the act, the term "agency" meant any executive department, commission, independent establishment or Government corporation, but did "not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." The same provision was in the Reorganization Act of 1949. The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General as an agent of the Congress.

Although the President nominates, and with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General, even for cause. The Comptroller General is appointed for a 15-year term, but he may be removed either by impeachment or by a joint resolution of Congress after notice and an opportunity for a hearing for specified statutory causes, permanent disability, inefficiency, neglect of duty, malfeasance, or felony or conduct involving moral turpitude.

Given the breadth of the grounds of removal, particularly the terms inefficiency and neglect of duty, Congress enjoys a relatively unlimited power over the tenure and Office of the Comptroller General. Congress expected this broad power of removal to give it the right to effectively control the Comptroller General.

The chief House manager of the Budget and Accounting Act stated in respect to the new position of Comptroller General, "This officer is to be the arm of Congress. When he fails to do that work in a strong and efficient way, in a way the Congress would have the law executed, Congress has its remedy, and it can reach out and say if the man is not doing his duty, if he is inefficient or guilty of any of these other things, he can be removed."

Thus, the Comptroller General is unquestionably part of the legislative branch and is directly accountable to Congress. His status as a legislative officer may not be changed simply by assigning him certain executive responsibilities.

As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own committees. The Supreme Court has most recently and thoroughly considered the scope of Congress' authority to act through its agents in the *Chadha* case.

In *Chadha* the court declared unconstitutional a one-House legislative veto provision. In so doing, the court underscored the constitutional requirement that in order for Congress to bind or effect the legal rights of Government officials or private persons outside the legislative branch, it must act by legislation presented to the President for his signature or veto.

Basically, *Chadha* holds that when Congress takes action that has the effect—no, excuse me, "the purpose and effect of altering the legal rights, duties and relations of persons * * * outside the legislative branch," it must act by passing a law and submitting it to the President in accordance with the presentment clauses and the constitutionally prescribed separation of powers. The court emphasized that:

* * * When the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined a procedure for that action.

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional role of the Comptroller General it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, may not take ac-

tions that bind individuals and institutions outside the legislative branch. He may advise and assist Congress in reviewing the performance of the executive branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States.

Our analysis of the bid protest provisions of the CICA is based upon these conclusions. Under the provisions of the CIA—CICA, excuse me, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision.

As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on the bid protest.

From a constitutional perspective we find nothing improper in the requirement for a stay in and of itself. Congress frequently requires executive branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so-called report and wait requirements were specifically recognized by the Supreme Court in *Chadha* as a constitutionally acceptable alternative to the legislative veto.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. CICA gives the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed. This authority amounts, in *Chadha's* words, to a power that has the effect of altering legal rights, duties and relations of persons outside the legislative branch. As a constitutional matter, then, there is very little difference between this power and the power of a legislative veto.

I've gone through this testimony and the testimony now includes an analysis of severability issues here. I think what I will do is move forward from that and simply make reference to them by the testimony itself and move to some other issues, if I may, Mr. Chairman.

Outside of severability, then, let me say that we wish to emphasize that we do not question the validity of the remainder of the CICA and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain executive branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests.

In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the executive branch.

The final issue that I would like to address is the decision of the Attorney General not to execute the unconstitutional provisions of the CICA. Under the Constitution the President and his subordinates have a duty to take care that the laws be faithfully executed, article II, section 3.

Unquestionably, the requirements of the Constitution prevail over any statute adopted by Congress. Therefore, in the case of a

conflict between the Constitution and the statute the President's duty faithfully to execute the laws requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land.

We recognize, however, that until a law is adjudicated to be unconstitutional, the issue of enforcing a statute of questionable constitutionality raises sensitive problems under the separation of powers. Historically, the executive has taken the position that the Department appropriately will not defend the constitutionality of a statute when the statute, as does the CICA, infringes upon the constitutional prerogatives of the executive.

The President has a constitutional right, indeed a duty, to maintain the separation of powers established by the Constitution. The legitimacy of such a refusal by the Department not to defend the constitutionality of a statute has long been recognized. For example, during the impeachment trial of President Andrew Johnson, Chief Justice Chase declared that the President had no duty to execute a statute passed by Congress which directly attacks and impairs the executive power confided to him by the Constitution.

In that case, it appears to me to be the clear duty of the President to disregard the law so far, at least, as it may be necessary to bring the question of its constitutionality before the judicial tribunals. How can the President fulfill his oath to "preserve, protect and defend the Constitution," if he has no right to defend it against an act of Congress sincerely believed by him to be passed in violation of it?

This general principle has been carried out by the executive branch in a number of instances since the time of President Johnson. For example, in a major case the President acted directly contrary to a statute to prohibit the removal of a postmaster based upon his conclusion that the statute was unconstitutional. This act eventually led to the executive successful challenge to the act's constitutionality in litigation brought by the removed postmaster. That is the basic case of *Myers v. United States*.

I also in the testimony refer to other litigated cases that deal with this same issue.

Let me make reference to additions to those examples which involve actual litigation with respect to constitutional conflicts and cite a number of examples of Presidential refusals to execute statutes that unconstitutionally infringe upon Presidential prerogatives by purporting to give Congress the authority to direct the executive branch with respect to the execution of the law.

For example, in 1955, almost three decades before the *Chadha* case was decided, President Eisenhower instructed the Secretary of Defense to ignore a so-called committee approval decision contained in a Department of Defense appropriations act by stating in a signing statement that the provisions "will be regarded as invalid by the executive branch of the Government unless otherwise determined by a court of competent jurisdiction."

In 1963 President Kennedy stated that the unconstitutional features of another committee approval device would be ignored, with the provision to be treated as a "request for information."

President Lyndon Johnson also made clear that the unconstitutional aspects of legislative veto devices would be ignored.

There are some other instances cited in the testimony that I will not make reference to here.

The *Chadha* court never suggested that there was any impropriety in the President's conduct in contesting acts of Congress which he believed infringed on his constitutional prerogatives.

I would also like to note that the Attorney General properly followed the statutory procedures for the notification of Congress with respect to decision not to defend the constitutionality of statutes in this instance.

The decision not to execute the unconstitutional provisions of the CICA is entirely consistent with historical and judicial precedent. The two provisions at issue directly infringe upon the constitutional prerogatives of the executive branch by purporting to permit an arm of the legislature to bind executive branch officials.

As we indicated earlier, this constitutional defect is precisely the same problem that caused the Supreme Court to strike down the legislative veto in *Chadha*. Thus, the same considerations that motivated Presidents Eisenhower, Kennedy, and Johnson to direct the executive branch to disregard certain legislative veto provisions, also warrant the decision—particularly now that the Supreme Court in *Chadha* has so clearly declared legislative vetoes to be unconstitutional—not to execute the provisions purporting to give an arm of the legislature the authority to bind the executive branch.

Finally, I would like to make one additional point with respect to this issue. We all recognize that the constitutional issue at stake will be ultimately resolved by the courts, and the most responsible method for resolving this dispute concerning the separation of powers is to ensure a rapid judicial hearing of this question if the Department were to execute fully the provisions of the CICA. However, we believe it is unlikely that the substantive issue would ever be able to be presented to a court. We believe that it is unlikely, if the executive branch were to implement fully the provisions of the CICA, anyone would have standing to challenge the constitutionality of the provisions that authorize the Comptroller General to bind the executive branch.

Thus, on the basis of this conclusion, the Department's decision not to enforce the two unconstitutional provisions has a beneficial biproduct of rendering much more likely a speedy judicial resolution of the question, which would be in the best interest of both the executive and legislative branches and would be more responsible to the special separation of powers problems presented by this issue.

As I made brief note before, a final note, I add that the Department's policy of nonenforcement, a first challenge has been filed that raises the issue of the constitutionality of the CICA. This is in a case filed in the Ninth Circuit in the Central District of California.

I understand that the Comptroller General, the House and the Senate have all asked to participate in this litigation with respect to the constitutional issue. Thus, it seems clear that the courts will be permitted to have a final and expeditious say on this question.

I attempted to abridge that testimony, Mr. Chairman, and now, if I can, make myself available to answer questions.

[Mr. Jensen's prepared statement follows:]

TESTIMONY OF D. LOWELL JENSEN
ACTING DEPUTY ATTORNEY GENERAL
BEFORE THE LEGISLATION AND NATIONAL SECURITY
SUBCOMMITTEE OF THE HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

March 7, 1985

I am happy to appear before you today to discuss the Department's position with respect to the Competition and Contracting Act of 1984 ("CICA" or "the Act"), which was enacted as part of the Deficit Reduction Act of 1984. Public Law No. 98-369, 98 Stat. 494 (1984). When the President signed this legislation into law, he requested the Attorney General to inform the Executive Branch agencies regarding how to comply with the Act in a manner consistent with the Constitution. As you know, in response to this request, the Department has determined that federal agencies should not execute certain bid-protest provisions of the Act. The first provision requires a procuring agency to suspend or "stay" any procurement if a bid protest is filed prior to the award of a contract or within ten days after the award. The provision then purports to authorize the Comptroller General to lift this stay of the procurement by issuing his decision on the bid protest. See revised 31 U.S.C. § 3553(c) and (d). The second provision purports to authorize the Comptroller General to make binding awards of attorney's fees and bid preparation costs to successful bid protestors. See revised 31 U.S.C. § 3554(c).

Before I discuss these specific provisions, however, there are several points that I would like to make with respect to the Department's position on the CICA. First, I want to emphasize that the Department has no general objection to the bid protest procedures established by the CICA. To the contrary, we believe that the Comptroller General plays a very useful advisory role in the bid protest area, and we believe that his participation has been extremely helpful in resolving bid protest disputes. Thus, we are happy to see the Comptroller General continue his review of bid protests, and we have no objection to the explicit statutory authorization for this role that is set forth in the CICA.

Second, we are entirely sympathetic with the need, in some instances, to suspend or delay a procurement in order to resolve the legal questions raised by a bid protest. Because the Executive Branch is sensitive to the need for a stay in some circumstances, the Federal Acquisition Regulations (FAR) provided prior to the CICA, and the revised FAR provisions on bid protests continue to provide, for the suspension of a procurement if a bid protest is filed prior to the award of a contract. See 48 C.F.R. § 33.104(b), 50 Fed. Reg. 2271 (January 15, 1985). Thus, although we do not believe that the Comptroller General may play a role in determining when a stay may be lifted, the Executive Branch has provided on its own a stay provision that substantially meets the concerns that motivated the stay provision in the CICA.

In explaining the Department's decision, I would like to discuss three general subjects. First, I would like to set forth the history of the Department's policy with respect to this issue in order to place the decision in its proper context. Next, I would like briefly to describe the grounds for our legal conclusion with respect to the constitutionality of the CICA. Finally, I would like to discuss the reasons underlying the Department's decision not to enforce the unconstitutional provisions of the Act.

I

Since the adoption of the Budget and Accounting Act in 1921, the Department has taken a consistent position with respect to the power and authority of the Comptroller General. Because the Comptroller General is part of the Legislative Branch of the Government, the position of the Department has been that the Comptroller General may not bind the Executive Branch. See, e.g., Testimony of Larry Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, before the Subcommittee on Legislation and National Security of the House Committee on Government Operations, 95th Cong., 2d Sess. (June 28, 1978). Although differences of opinion with respect to the proper role of the Comptroller General have led to a number of disputes between the Department and GAO, these disputes have not come to a head because the Comptroller General has not pressed his authority to bind the Executive Branch.

Early in 1984, the Department received a request from this Committee for comments on bid protest provisions, similar to the ones finally adopted in the CICA, that were then under consideration by the Committee as part of H.R. 5184. The Department commented on and objected to the constitutionality of the two provisions that purported to give the Comptroller General the authority to bind the Executive Branch. See Letter to Honorable Jack Brooks, Chairman, House Committee on Government Operations, from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (April 20, 1984). I would be happy to provide the Committee with a copy of this letter and any other documents referred to in my testimony. These comments were based on the Department's long-standing position with respect to the proper constitutional role of the Comptroller General and the authority of the Legislative Branch as most recently defined in INS v. Chadha, 462 U.S. 919 (1983).

Despite the comments of the Department with respect to the unconstitutionality of these provisions, the provisions were ultimately adopted by Congress as part of the CICA, which itself was made a part of the Deficit Reduction Act. Although the President believed the two provisions of the CICA that empowered the Comptroller General to bind the Executive Branch to be unconstitutional, he concluded that it would not be in the national interest to veto the entire Deficit Reduction Act because of

these provisions. Therefore, the President noted in a signing statement his constitutional objections to these provisions and requested the Department of Justice to inform Executive Branch agencies how they might comply with the Act in a manner consistent with the Constitution. See 30 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

Thereafter, the Office of Legal Counsel prepared a memorandum, which concluded that the two provisions purporting to vest the Comptroller General with authority to bind the Executive Branch were unconstitutional and recommended that these provisions not be enforced by the Executive Branch. See Memorandum for the Attorney General, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, re "Implementation of the Bid Protest Provisions of the Competition and Contracting Act" (October 17, 1984). The Attorney General directed that this memorandum be distributed to the Executive Branch agencies responsible for implementing the provisions of the CICA.

Subsequently, the Attorney General expressly adopted the conclusions of the Office of Legal Counsel in letters sent to the Speaker of the House and the President of the Senate to inform Congress, as required by statute, of the Department's decision not to enforce the two unconstitutional provisions of the CICA. See Letters to Honorable Thomas P. O'Neil, Jr., Speaker

of the House of Representatives, and Honorable George Bush, President of the Senate, from William French Smith, Attorney General (November 21, 1984). In addition, the Attorney General responded by a letter of the same date to a letter from Senator William S. Cohen, Chairman of the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs. In the letter to Senator Cohen, the Attorney General reiterated the basis for the Department's conclusions with respect to the unconstitutionality of the CICA and, in particular, set forth the basis for the Department's decision to advise Executive Branch agencies not to comply with the unconstitutional provisions.

The Attorney General also sent a letter to the Director of the Office of Management and Budget (OMB), dated November 21, 1984, which requested the Director to assist in ensuring compliance by all Executive Branch agencies with the legal advice provided by the Department of Justice concerning the CICA. Subsequently, the Director of OMB issued a bulletin to the heads of executive departments and agencies setting forth procedures governing implementation of the CICA, which advised executive agencies to conduct their contracting activities in accordance with the Attorney General's legal advice. See OMB Bulletin No. 85-8 (December 17, 1984).

The bid protest provisions of the CICA went into effect on January 15, 1985, and litigation has already been filed to test the validity of the Department's conclusions with

respect to the unconstitutionality of the two bid protest provisions.

II

The next issue I would like to address is the substance of the Department's legal conclusion that the two provisions purporting to authorize the Comptroller General to bind the executive branch are unconstitutional. The Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921. See 42 Stat. 23 (1921). The Budget and Accounting Act expressly stated that the Comptroller General is "independent of the executive departments" Id. Subsequent legislation made it clear that the Comptroller General is part of the Legislative Branch. The Reorganization Act of 1945 specified that, for the purpose of the Act, the term "agency" meant any executive department, commission, independent establishment, or government corporation, but did "not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." 59 Stat. 616 (1945). The same provision was included in the Reorganization Act of 1949. See 63 Stat. 205 (1949). The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General "as an agent of the Congress" 64 Stat. 835 (1950).

Although the President nominates and, with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General,

even for cause. See 31 U.S.C. § 703 (1982). The Comptroller General is appointed for a fifteen-year term, but he may be removed either by impeachment or by a joint resolution of Congress, after notice and an opportunity for hearing, for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1). Given the breadth of the grounds of removal, particularly the terms "inefficiency" and "neglect of duty," Congress enjoys a relatively unlimited power over the tenure in office of the Comptroller General. 1/

Congress expected this broad power of removal to give it the right effectively to control the Comptroller General. The chief House manager of the Budget and Accounting Act stated with respect to the new position of Comptroller General:

This officer is to be the arm of Congress. When he fails to do that work in a strong and efficient way, in a way that Congress would have the law executed, Congress has its remedy, and it can reach out and say if the man is not doing his duty, if he is inefficient or guilty of any of these other things, he can be removed.

61 Cong. Rec. 1080 (1921) (remarks of Rep. Good).

1/ The Supreme Court has recognized that the power to remove an official is necessarily linked to the power to supervise and control the actions of that official. See Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935).

Thus, the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. His status as a legislative officer may not be changed simply by assigning him certain executive responsibilities. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees.

The Supreme Court has most recently and thoroughly considered the scope of Congress's authority to act through its agents in INS v. Chadha, 462 U.S. 919 (1983). In Chadha, the Court declared unconstitutional a one-house legislative veto provision. In so doing, the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto:

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.

103 S. Ct. at 2782. When Congress takes action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," it must act by passing a law and submitting it to the President in accordance with the Presentment Clauses and the constitutionally

prescribed separation of powers. Id. at 2784 (emphasis added).

The Court emphasized that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." Id. at 2786. 2/

Finally, with respect to Congress's power over the Legislative Branch, the Court concluded:

One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each house has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Id. at 2786 n.20 (emphasis added).

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional

2/ As the Court noted, there are only four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto: the power of the House of Representatives to initiate impeachment, the power of the Senate to try individuals who have been impeached by the House; the power of the Senate to approve or disapprove presidential appointments; and the power of the Senate to ratify treaties negotiated by the President. See 103 S. Ct. at 2786.

role of the Comptroller General, it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, and he may not take actions that bind individuals and institutions outside the Legislative Branch. He may advise and assist Congress in reviewing the performance of the Executive Branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States. Our analysis of the bid protest provisions of the CICA is based upon these conclusions.

Under the stay provision of the CICA, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision on a bid protest. As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest.

From a constitutional perspective, we find nothing improper in the requirement for a stay, in and of itself. Congress frequently requires Executive Branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so-called "report and wait" requirements

were specifically recognized by the Supreme Court in Chadha as a constitutionally acceptable alternative to the legislative veto. See 103 S. Ct. at 2783.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. The CICA gives the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed. This authority amounts, in Chadha's words, to a power that has the "effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." See 103 S. Ct. at 2784. As a constitutional matter, there is very little difference between this power and the power of a legislative veto.

A difficult problem is presented in this instance, however, by the question of the extent to which the unconstitutional provision is severable from the remainder of the CICA. In Chadha, the Court ruled that an unconstitutional provision is generally presumed to be severable. The Court outlined several guidelines with respect to evaluating this issue in a specific instance. First, the Court stated:

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." Buckley v. Valeo, 424 U.S. 1, 108 . . . (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 . . . (1932).

INS v. Chadha, 103 S. Ct. at 2774. Thus, unless there are clear indications that Congress would have intended additional parts of

statute to fall because of the invalidity of a single provision, the invalid provision will be severed. Second, the Court stated that Congress did not intend that the entire statute or any other part of it would fall simply because another provision was unconstitutional. 103 S. Ct. at 2775. Finally, the Court stated that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.' Champlin Refining Co. v. Corporation Comm'n, supra, 286 U.S. at 234." 103 S. Ct. at 2775. The severability issue must be analyzed in light of these principles.

The only aspect of the stay provision that is directly unconstitutional is the provision authorizing the Comptroller General to lift the stay by issuing his decision or finding that a particular protest is frivolous. If this provision alone were severed, the stay would remain in effect indefinitely because there would be no remaining statutory basis for terminating the stay. Although the statute could technically operate this way, as a practical matter this alternative would seem quite draconian because it would permit any bid protester effectively to cancel a procurement simply by filing a protest. It is clear that Congress did not intend such a result when it adopted the CICA. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984).

Alternatively, the stay provision could be interpreted to require a mandatory stay for a set period of time in order to give the Comptroller General an opportunity to reach a decision

on the bid protest. This period of time might be set at 90 working days, which is the period of time established by the CICA as the standard time within which the Comptroller General should issue his decision on a bid protest.

We do not believe, however, that such a reworking of the statute would be consistent with Congress's intent. First, such a construction would involve essentially a redrafting of the stay provision rather than simple severance of the offending sections. Second, and more important, it would mean that any time a bid protest were filed, a procurement would automatically be delayed for 90 working days. Thus, any interested party who might be able to file a protest, however ill-founded, could prevent a procurement for a not insubstantial period of time.

We do not believe that Congress intended the bid protest process to be subject to such potential manipulation. In fact, Congress expressly included the provision granting the Comptroller General the power to dismiss frivolous protests precisely in order to avoid this potential abuse. The conference report stated:

The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a solid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from

being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984). Given our conclusion that the provision permitting the Comptroller General to terminate the stay immediately in the case of a frivolous protest is unconstitutional, we do not believe that Congress would have intended for all contracts to be delayed for any set period of time simply upon the filing of a protest, regardless of the good faith of the protestor or merit of the protest. Therefore, because the provisions permitting the Comptroller General to terminate the stay must be severed from the statute, we believe that the entire stay provision must be stricken as well. 3/

The provision permitting the Comptroller General to award costs, including attorney's fees and bid preparation costs, to a prevailing protestor, and which purports to require federal agencies to pay such awards "promptly," 31 U.S.C. § 3554(c)(2), suffers from a constitutional infirmity similar to the one that afflicts the stay provision. By purporting to vest in the Comptroller General the power to award damage against an

3/ We do not doubt that, under the severability principles set forth above, the stay provision may be severed. The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated.

Executive Branch agency, Congress has attempted to give its agents the authority to alter "the legal rights, duties and relations of persons . . . outside the legislative branch." 103 S. Ct. at 2784. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise judicial authority than it may exercise executive authority. See INS v. Chadha, 103 S. Ct. at 2788 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, see Humphrey's Executor v. United States, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

Based on the foregoing discussion of the law of severability, we believe that the damages provision is clearly severable from the remainder of the CICA. The remainder of the Act is unrelated to the damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute.

We wish to emphasize that we do not question the validity of the remainder of the CICA, and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain Executive Branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch.

III

The final issue that I would like to address is the decision of the Attorney General not to execute the unconstitutional provisions of the CICA. Under the Constitution, the President and his subordinates have a duty "to take Care that the Laws be faithfully executed." Art. II, § 3. Unquestionably, the requirements of the Constitution prevail over any statute adopted by Congress. Therefore, in the case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the laws requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land.

We recognize, however, that, until a law is adjudicated to be unconstitutional, the issue of enforcing a statute of questionable

constitutionality raises sensitive problems under the separation of powers.

Historically, the Executive has taken the position that the Department appropriately will not defend the constitutionality of a statute when the statute, as does the CICA, infringes upon the constitutional prerogatives of the Executive. The President has a constitutional right, indeed a duty, to maintain the separation of powers established by the Constitution: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 462 U.S. 919 (1983).

The legitimacy of such a refusal by the Department not to defend the constitutionality of a statute has long been recognized. For example, during the impeachment trial of President Andrew Johnson, Chief Justice Chase declared that the President had no duty to execute a statute passed by Congress which:

directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

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How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to be passed in violation of it? 4/

This general principle has been carried out by the Executive Branch in a number of instances since the time of President Johnson. For example, the President acted directly contrary to a statute that prohibited the removal of a postmaster, based on his conclusion that the statute was unconstitutional. This act eventually led to the Executive's successful challenge to the act's constitutionality in litigation brought by the removed postmaster. Myers v. United States, 272 U.S. 52 (1926). See also Humphrey's Executor v. United States, 295 U.S. 602 (1935). In other instances, the Executive refused to defend statutes that impaired the constitutional prerogatives of the Presidency. See United States v. Lovett, 328 U.S. 303 (1946) (successful challenge to a statute that directed the salaries of certain federal employees not be paid); Buckley v. Valeo, 424 U.S. 1 (1976) (successful challenge to constitutionality of a statute that permitted appointment of members of the Federal Election Commission by members of Congress).

4/ R. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase, 685 (1874) (emphasis in original). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that Tenure in Office Act was unconstitutional. Id. See M. Benedict, The Impeachment and Trial of Andrew Johnson, 154-55 (1973). Ultimately, the Senate admitted evidence that the President had desired to initiate a court test of the law. Id. at 156.

In addition to these examples involving actual litigation with respect to constitutional conflicts, there are a number of examples of presidential refusals to execute statutes that unconstitutionally infringe upon presidential prerogatives by purporting to give Congress the authority to direct the Executive Branch with respect to the execution of the law. For example, in 1955, almost three decades before the Chadha case was decided, President Eisenhower instructed the Secretary of Defense to ignore a so-called "committee approval" provision contained in a Department of Defense appropriations act, by stating in a signing statement that the provisions "will be regarded as invalid by the Executive Branch of the Government . . . unless otherwise determined by a court of competent jurisdiction."

Public Papers of the Presidents: Dwight D. Eisenhower, 689 (1955). In 1963, President Kennedy stated that the unconstitutional features of another committee approval device would be ignored, with the provision to be treated as a "request for information." Public Papers of the Presidents: John F. Kennedy, 6 (1963). President Johnson also made clear that the unconstitutional aspects of legislative veto devices would be ignored.

Public Papers of the Presidents: Lyndon B. Johnson, 104, 1250 (1963-64). President Johnson instructed the Secretary of Agriculture, in connection with the making of loans under an amendment to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1010-12, "to refrain from making any loans which would

require committee approval." 2 Weekly Comp. Pres. Doc. 1676 (1966). The Chadha court never suggested that there was any impropriety in the President's conduct in contesting acts of Congress he believed infringed on his constitutional prerogatives. I would also like to note that the Attorney General properly followed the statutory procedures for the notification of Congress with respect to decisions not to defend the constitutionality of statutes.

The decision not to execute the unconstitutional provisions of the CICA is entirely consistent with historical and judicial precedent. The two provisions at issue directly infringe upon the constitutional prerogatives of the Executive Branch by purporting to permit an arm of the legislature to bind Executive Branch officials. As we indicated earlier, this constitutional defect is precisely the same problem that caused the Supreme Court to strike down the legislative veto in Chadha. Thus, the same considerations that motivated President's Eisenhower, Kennedy, and Johnson to direct the Executive Branch to disregard certain legislative veto provisions also warrant the decision (particularly now that the Supreme Court in Chadha has so clearly declared legislative vetoes to be unconstitutional) not to execute the provisions purporting to give an arm of the legislature the authority to bind the Executive Branch.

IV

Finally, I would like to make one additional point with respect to this issue. We all recognize that the constitutional issue at stake here will ultimately be resolved by the courts

and that the most responsible method for resolving this dispute concerning the separation of powers is to ensure a rapid judicial hearing of this question. If the Department were to execute fully the provisions of the CICA, however, we believe it is unlikely that the substantive issue would ever be able to be presented to a court. We believe that it is unlikely that, if the Executive Branch were to implement fully the provisions of the CICA, anyone would have standing to challenge the constitutionality of the provisions that purport to authorize the Comptroller General to bind the Executive Branch. Thus, on the basis of this conclusion, the Department's decision not to enforce the two unconstitutional provisions has the beneficial byproduct of rendering much more likely a speedy judicial resolution of this question, which would be in the best interests of both the Executive and Legislative Branches and would be most responsive to the special separation of powers problems presented by this issue.

As a final note, I would add that under the Department's policy of non-enforcement, the first challenge has been filed that raises the issue of the constitutionality of the CICA. See Lear Siegler, Inc., Energy Products Division v. Lehman, No. 85-1125 KN (C.D. Ca.). I understand that the Comptroller General, the House, and the Senate have all asked to participate in this litigation with respect to the constitutional issue. Thus, it seems clear that the courts will be permitted to have the final say on this question.

Mr. BROOKS. Thank you, Mr. Jensen.

Is it the Justice Department's contention that the Competition in Contracting Act is unconstitutional because it contains a legislative veto provision?

Mr. JENSEN. A parallel to a legislative veto position. That was what we were talking about in terms of *Chadha*. We were talking about the effect of the two provisions of the act that we deem unconstitutional. That is, lifting the stay allows the legislative branch, through the Comptroller General, to define and alter the legal rights of the procuring agencies, the contracting agencies.

And, very specifically, in the grant of attorneys' fees and bid protest costs, what is happening in that instance is the Comptroller General is directly affecting the agencies and declaring and binding their activity in terms of payment of those fees.

Mr. BROOKS. Isn't it ironic that the Justice Department is here today arguing that the Competition Act, which I authored along with Frank Horton, contains a legislative veto-like provision. The members will recall, that in 1977 I argued against a legislative veto provision contained in an act providing reorganizational authority for the executive. That provision, I contended, raised serious constitutional questions involving the separation of powers doctrine. The Justice Department then provided a statement for the committee supporting the constitutionality of that legislative veto provision. It was prompted, no doubt, by the executive's enthusiasm for reorganization authority.

In any case, the Supreme Court vindicated my position on legislative vetoes 2 years ago and now the Justice Department is back here contending that I slipped up in drafting last year and I incorporated a comparable legislative veto, or a legislative veto-like provision in the Competition in Contracting Act. I think, with all due respect, that you're just wrong again.

I have one other question that I will ask you now, and then I'll have some to submit to you—

Mr. JENSEN. Certainly.

Mr. BROOKS [continuing]. In the interest of time.

What would you recommend to the President of the United States if this year's appropriations and authorization bills—when they're passed by Congress—contained language requiring agencies to fully implement the Competition Act?

Mr. JENSEN. Well, we would have to look at that as we did this particular bill. And, the analysis would be to decide whether or not, in the opinion of the Attorney General, there was an unconstitutional provision, and we would provide that advice to the President. It would be the President's decision as to whether or not to proceed with any given bill. The substance of the bill and the policy alternatives implicit therein are, of course, the President's.

Our role is as it was here, and that is as we see the enactment of this legislation approaching, we advise the Congress, if it was our opinion that it was unconstitutional and we would subsequently so advise the President.

Mr. BROOKS. Do you think he would veto it? Would he—

Mr. JENSEN. I couldn't say. That's the sort of thing that, if we look at this particular bill, as you know, the signing was as a result of the fact that the bill, in the President's analysis, had an inter-

est—national interest provisions in terms of the Deficit Reduction Act itself, and that's why——

Mr. BROOKS. Put that on that nice big fat foreign aid bill that he's for and we'll see what he does with that.

Mr. JENSEN. I have no idea. As I say, the decision in terms of any bill or any legislative construction that gets to the desk of the President, it's his decision to sign or to veto.

Our analysis is simply the same as we've done here. That is, a legal analysis of the implications of the bill itself.

Mr. BROOKS. Mr. Horton.

Mr. HORTON. Thank you, Mr. Chairman.

Mr. BROOKS. I'll submit a few questions, if I might.

Mr. JENSEN. We'll be happy to respond to those, Mr. Chairman.

[Mr. Jensen's submissions to Mr. Brooks' additional questions follow:]

ADDITIONAL QUESTIONS OF MR. BROOKS
FOR D. LOWELL JENSEN

1. Question: In view of the Department's position that the bid protest provisions of the Competition in Contracting Act raise serious constitutional issues, why didn't you simply recommend to the President that he veto the Deficit Reduction Act?

Answer: The decision whether or not to veto a bill is made solely by the President at the time the bill as enrolled is presented to him for signature. He generally has before him at that time the advice of a number of officials within the Executive Branch, including the Attorney General. He must make his decision upon that advice and all of the facts and circumstances before him. We must assume that in this case the President decided not to veto the entire Deficit Reduction Act because of the importance of other provisions contained in that Act to the national interest, notwithstanding the constitutional flaws of the CICA.

2. Question: Has the Supreme Court ever addressed the issue of a President's refusal to faithfully execute a duly enacted law?

Answer: Insofar as this question refers to whether the Supreme Court has ever adjudicated the validity of a President's conclusion that a duly enacted statute was unconstitutional, the answer is yes. For example, in Myers v. United States, 272 U.S. 52 (1926), the Supreme Court ruled that Congress is not permitted to restrict the President's right to remove purely executive officials. In so ruling, the Supreme Court rejected the challenge of a postmaster who had been fired by the President in contravention of an explicit statutory limitation on the President's removal power. When the case reached the Supreme Court, the Court determined that the statute was, and always had been, unconstitutional and therefore, that it did not bind or limit the President's removal power.

When a case concerning the Executive's failure to comply with a statute reaches the Supreme Court, the issue is solely whether the statute is constitutional or not. If the statute is unconstitutional, then the Executive was never bound by the statute. If, on the other hand, the Court determines that the statute is constitutional, the Executive is bound by that determination and must implement the statute.

The Supreme Court does not have to reach in that instance the issue whether the Executive's decision not to comply with the statute in the interim was proper or improper per se. We are aware of no criticism by the Court of a President's decision not to implement or defend the constitutionality of a statute.

3. QUESTION: Does the Justice Department still adhere to its view that the Executive is justified in suspending the bid protest provisions of CICA because ". . . prior precedent overwhelmingly indicates that the statute is invalid"?

ANSWER: We continue to believe that prior precedent overwhelmingly indicates that the statute is invalid, but that conclusion is not the sole basis for our decision not to comply with the unconstitutional provisions of the CICA. We would also note that our action cannot be accurately characterized as "suspending the bid protest provisions of CICA." As we have tried to emphasize, the Department has objected to the constitutionality of only two specific provisions of the bid protest section of the CICA. We have no objection to the remainder of the bid protest section, which comprises the vast majority of the bid protest provisions. In fact, the Department's legal conclusion and consequent advice to Executive agencies has resulted in the implementing of the entirety of the CICA, with the exception of the two disputed provisions.

4. QUESTION: Were you asked by the major procuring agencies to challenge the bid protest provisions of the CICA?

ANSWER: No.

5. QUESTION: If a district court concludes that the Competition in Contracting Act provisions are constitutional, will the Executive suspend its order to disobey the law?

ANSWER: Subsequent to your letter of March 12, 1985, Judge Ackerman of the United States District Court for the District of New Jersey held in Ameron, Inc. v. U.S. Army Corps. of Engineers, et. al., No. 85-1064 (March 27, 1985) that the disputed provisions of CICA are constitutional. Although we strongly disagree with Judge Ackerman's conclusion, we will, of course, comply with all orders issued in that case unless and until they are stayed or reversed by an appellate court.

However, the Department will continue to advance its firm belief that the disputed provisions of CICA are unconstitutional in other litigation, and will seek appellate review of the issue in appropriate cases. We expect that the Supreme Court will ultimately decide whether the disputed provisions are constitutional, and we will, of course, abide by the Supreme Court's decision. We do not believe, however, that it is appropriate for the Attorney General to alter his legal advice concerning how Executive Branch agencies may constitutionally implement CICA before the constitutional issues are fully litigated through the appellate courts.

6. QUESTION: Do you believe the President has the authority to fire the Comptroller General?

ANSWER: No. If the language and the legislative history of the Budget and Accounting Act of 1921 make one thing clear, it is that the Comptroller General is an officer of Congress who is intended to be accountable to Congress and not removable by the President. See 61 Cong. Rec. 1080 (1921)(remarks of Rep. Good). The statute sets forth impeachment or joint resolution of Congress as the sole means of removal.

7. QUESTION: What other laws currently on the books do you find constitutionally objectionable?

ANSWER: The Department has already notified Congress with respect to any other laws, the constitutionality of which the Department has determined it does not intend to defend.

8. QUESTION: GAO has reported that numerous discrepancies exist between the Legislative intent and Executive implementation of CICA because of an apparent disregard for the Conference Report (98-861) by the implementing agencies. Why has the Executive chosen, in this manner, not to enforce certain other provisions of the law?

ANSWER: The Department of Justice is not aware of any other aspects of the CICA that the Executive Branch has not implemented. As we have indicated, our objections relate only to the provisions that purport to give the Comptroller General the power to bind the Executive Branch. In all other respects, we believe that the Executive Branch is implementing the statute in its entirety.

Mr. HORTON. I have a number of questions, too, Mr. Jensen, I'll submit for response in writing. But, I do have some questions I'd like to ask you.

Confining your answer to the very narrow issue of the Attorney General declaring a portion of an act unconstitutional and then directing that OMB issue an order that agencies not carry out the provisions of that law because it's unconstitutional, two questions:

What is the authority for your doing this? And then, second, do you know of any other instances, in that narrow framework, in which this has been done? In other words, is this a new step?

Mr. JENSEN. Let me add, very quickly, the authority is in the Constitution, as I've indicated, to faithfully execute the Constitution and it's the Presidential authority in that regard——

Mr. HORTON. Now wait a minute. Wait a minute. To "faithfully execute the Constitution"?

Mr. JENSEN. Yes.

Mr. HORTON. Well, if it's a bill passed and it has not been declared unconstitutional, the Constitution requires that he uphold the law.

Mr. JENSEN. He has a separate responsibility, the implication is that his responsibility is that he will not execute an unconstitutional law and he has—as I've indicated in testimony, he——

Mr. HORTON. Well, now wait, wait, wait again.

Is this the corner drugstore person who declares it to be unconstitutional? I thought that the courts were invested with that power.

Mr. JENSEN. Perhaps I could give an example. I think it might——

Mr. HORTON. Yes, please do.

Mr. JENSEN. Suppose we have a situation—we go back to *Chadha* itself and we look at the *Chadha* case and we see that there was a legislative act that was declared to be unconstitutional. We all understand that. And, the next thing that happened was Congress passed the identical act again and the situation was such that the President signed it, now——

Mr. HORTON. Well, the Congress hasn't done that. You're making that one up.

Mr. JENSEN. Well, I know, but we're saying about——

Mr. HORTON. Well, no, you're saying "what if."

Mr. JENSEN. Well, of course.

Mr. HORTON. Well, no, no, I don't want to play "what if." What I want to do is ask you the specific question which I just asked; and that is: What is the authority that the Attorney General has to declare an act unconstitutional and then to further direct that agencies not carry out that act?

Mr. JENSEN. As I've indicated, it's the Executive and this comes from the separation of powers itself in the Constitution. The Executive has a responsibility—with reference to following the Constitution—when there is a conflict between the Constitution and an act, the Executive has a responsibility to act constitutionally, and the Executive makes that decision.

Mr. HORTON. But the declaration as to whether or not it's unconstitutional is vested in the courts, in the judiciary, and that goes way back to the first case any person in law school studies, *Mar-*

bury v. Madison. I mean, that's the very first one. I remember in my law school days that was the very first case I ever read, and that's where it all started from. Right there. Now, I have no quarrel with the Attorney General saying that we think this is unconstitutional, and then getting a determination of that. But, the idea that you can declare, on your own, a matter to be unconstitutional, and then act on that basis, is something that I think is innovative. That's new. I think that's breaking new ground.

Now, what I want to do is find out if that is new ground.

Mr. JENSEN. No; it is not new ground.

Mr. HORTON. Well, when has it been done before?

Mr. JENSEN. It's cited in the—in the testimony. More specifically, the one reference would be the instance I cited by President Eisenhower, when he signed an appropriations bill and found a specific portion of that bill which purported to give "committee approval to issues binding the executive branch" and he directed that the executive agencies not follow that. So, that's precisely the same issue.

This is not new ground. This is ground that has been asserted by Presidents over time. And, in the testimony I have made those references. President Johnson, President Coolidge, President Eisenhower, President Kennedy, and President Lyndon Johnson.

So, that, it's not new ground, Congressman.

Mr. BROOKS. I think President Eisenhower just threatened to do that and did not in fact——

Mr. JENSEN. No, he made that direction.

Mr. BROOKS. If we don't think he did it, we'll clarify that in that lawsuit. I don't know where you're going to be on it, but we'll get that clarified in that lawsuit.

I did want to observe that the Justice Department doesn't mention the only instance when the Supreme Court—that's where we propose to decide constitutionality matters—in the judgment of most people in this country—has directly addressed this issue. The Court said, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

This is from *Kendall v. U.S.*, 37 U.S.C., 524611, in 1838. That's been the law of the land ever since, and it still is until you can get it changed in the Supreme Court—not in the Justice Department, not in the executive and not in the legislative. We cannot decide that it's unconstitutional and just not do it and neither can you, and neither can the President and neither can the Director of OMB. I'm sorry, but we just haven't changed the Constitution. We're not operating under the laws prior to King James II in 1688 in England. We're not back to that stage. We've moved forward from that over the last 300 years and we're not going to go back, either.

Mr. HORTON. Mr. Jensen, I realize that this is a legal question of some magnitude, but I'd like to ask you to prepare a memorandum for us on whether this is a novel action or whether it's something that has been done before. And if you believe it has been done before, then perhaps you could give us some examples and justifications for that answer.

Mr. JENSEN. Yes. We would be happy to do that. We have done that in perhaps a more general sense in responding to Chairman Rodino who had an inquiry of that nature. We could provide this to you, but we could provide to you a more specific answer to the questions you've posed.

Mr. HORTON. Well, I think you understand what I'm asking.

Mr. JENSEN. Yes, I do.

Mr. HORTON. This is a very narrow area that I'm directing my attention to.

Mr. JENSEN. I will give you the other materials we've done and we'll make it more narrow.

[SUBCOMMITTEE NOTE.—At time of printing, the information had not been received.]

Mr. HORTON. This has to do with the memorandum which, in essence, declared this portion of the bill unconstitutional. Now, this might not be that important, but I am a little bit concerned that the memorandum was signed by Larry L. Simms, who was Acting Assistant Attorney General, Office of Legal Counsel. This was the memorandum that provided the basis for OMB's Directive No. 85-8, advising agencies not to implement the disputed provisions of the act.

Why was it a memorandum for the Attorney General rather than a memorandum from the Attorney General? Why was it not in the form of an Attorney General's opinion rather than a memorandum for the Attorney General? I don't know whether that would have any impact, but I certainly think that it could have some bearing on the basis on which it was carried out, whether or not it was an opinion or whether or not it was a declaration that the law was unconstitutional.

Mr. JENSEN. Well, what we could do, Mr. Congressman, is give you the direct regulations that set up the Office of Legal Counsel's responsibilities. I can tell you that what was done here comports completely with that. There isn't anything that gives you a specific bright line in terms of what should be a formal opinion of the Attorney General as opposed to a memorandum and this is simply a matter of what was done in this instance. It's a matter of choice.

One of the things I could do, however, that I think would be helpful, would be to provide you with the letters of submission by the Attorney General where he personally and directly incorporates that memorandum and submits it to OMB and the Congress. I will provide you with those letters that show you this was the direct act of the Attorney General.

[SUBCOMMITTEE NOTE.—At time of printing, the information had not been received.]

Mr. HORTON. All right. Now, as I say, I have a number of other questions for the record, but there is one other one I want to ask you now. This has to do with your position that the Comptroller General may not bind the executive. How do you explain that in view of the fact that the Comptroller General does have the authority to disallow any expenditures pursuant to his statutory authority to settle Government accounts? That's in 31 U.S.C. 3526(d).

The Comptroller General also has statutory authority to make accounts to the Secretary of the Treasury where an official receiving public money does not submit an account on his own. The

Comptroller General also has statutory authority to countersign warrants. In other words, those are authorities that the Comptroller General has to bind the executive branch. I'll give you the citations. He does have those authorities. Now, how do you reconcile your statement with that?

Mr. JENSEN. We don't think it's inconsistent, but what I would offer to do is to get the direct citations of the statutes that you refer to and we'll provide you a specific answer in a separate memorandum on that to show that our position is not inconsistent.

Mr. HORTON. Well, three of them are 31 U.S.C. 3526(d), 31 U.S.C. 3541(a), and 31 U.S.C. 3323(a).

Mr. JENSEN. We'll provide that.

Mr. HORTON. OK.

[SUBCOMMITTEE NOTE.—At the time of printing, the information had not been received.]

[Mr. Jensen's submissions to Mr. Horton's additional questions follow:]

ADDITIONAL QUESTIONS OF MR. HORTON
FOR D. LOWELL JENSEN

1. QUESTION: The Attorney General, in his letter of February 22, 1985, to Chairman Rodino, said that "The President's veto power is usually adequate to express and implement his judgment that an Act of Congress is unconstitutional." But he went on to say, "On some occasions, however, the exercise by the President of his veto power may not be feasible. For example, an unconstitutional provision may be part of a larger and vitally necessary piece of legislation."

In the same letter, the Attorney General alleged that "the legal theories and precedents underlying the Executive Branch's decision not to execute or defend a statute are inextricably intertwined." It seems to me, however, that it is one thing to refuse to defend a law in court, but quite another to refuse to execute an Act of Congress.

During World War II, President Roosevelt faced a situation similar to the one President Reagan encountered with regard to the Deficit Reduction Act: Congress passed an appropriations bill which contained a provision the President believed to be unconstitutional. He signed the bill into law because of the need for the appropriations, while expressing his belief that the provision, which would cut off the salaries of three government employees, was invalid. Nevertheless, he carried out the law. As a result the employees had to go to court to get their pay.

a. Why didn't President Reagan behave in the same manner with regard to the Deficit Reduction Act?

b. Where do you draw the line in determining whether it is "feasible" to exercise the veto power?

c. Would your view of the President's obligations to execute the law be any different in a case in which the President had vetoed the bill and Congress had passed it over his veto?

ANSWER: The fundamental principle that applies with respect to the above issues is that neither estoppel, laches, nor any other principle of waiver applies with respect to a subsequent challenge to the constitutionality of a bill that has been signed by the President. The Supreme Court made it clear in Chadha that the mere fact that a President has signed a bill with an unconstitutional provision does not constitute a waiver of the constitutional defect, nor does it

prevent the Executive from subsequently challenging the constitutional defect. As a general matter, it is appropriate for a President to veto a bill if he believes its provisions are unconstitutional. There are certain instances, however, in which Congress combines into one bill several pieces of unrelated legislation. In such an instance, the President must decide whether the constitutional defects contained in part of the bill outweigh the overall need of the Nation for the remainder of the legislation. Thus, the President must exercise his own judgment and act upon what he determines to be the national interest.

We note that during the first years of the operation of the Constitution, the practice of combining unrelated subjects into a single piece of legislation was unknown. Thus, the President could reasonably exercise his veto power based upon his evaluation of the benefits and problems created by a single piece of legislation. It was Congress's action in developing a practice by which disparate subjects were placed within a single bill that presented Presidents with the dilemma of accepting certain undesirable or unconstitutional provisions contained in one small part of a bill or doing without vitally necessary provisions contained in entirely unrelated acts that had been combined into a single bill.

The CICA is a classic example of this legislative technique. The CICA might well have been the subject of a presidential veto had it been enacted separately. Instead, however, it was attached to the vitally necessary Deficit Reduction Act in order to avoid a presidential veto. It seems hardly reasonable for Congress to go to such great lengths to thwart the President's constitutionally guaranteed veto power and then subsequently complain that the President did not veto a provision that Congress itself had made effectively veto-proof. Ultimately, the President cannot be required nor is he even able to bargain away the Constitution under such circumstances.

2. QUESTION: The Attorney General's letter to Chairman Rodino quotes approvingly of counsel to President Andrew Johnson in explaining the President's obligations; specifically, reference is made to Johnson's counsel's statement that "If the law be upon its face in flat contradiction of plain expressed provisions of the Constitution, . . . I say the President, without going to the Supreme Court of the United States, . . . is bound to execute no such legislation . . ." Do you believe that the provisions of the Competition in Contracting Act which have been called into question are on their face in flat contradiction of plain expressed provisions of the Constitution?

(If yes), What provisions?

(If no), What guidance do you find from President Johnson's counsel or any other authority as to the obligation of the President when the provision in question is not in flat contradiction of plain expressed provisions of the Constitution?

ANSWER: We do believe, for the reasons set forth in our previous communications with Congress, that the Competition in Contracting Act is in clear contravention of the Constitution, as it has been construed by the Supreme Court in Chadha. In Chadha, the Court expressly ruled that Congress may not bind anyone outside the Legislative Branch except by plenary legislation. Thus, an arm of Congress, such as a congressional committee or other congressional agent, may not under any circumstances bind the Executive Branch. Thus, because the Comptroller General is an officer of the Legislative Branch, it is clear that he may not bind the Executive Branch.

3. QUESTION: On page three of the Department's prepared testimony, Mr. Jensen stated that the Department's consistent position since the enactment of the Budget and Accounting Act of 1921 has been "The Comptroller General may not bind the Executive Branch." This is a basis for the Department's conclusion that certain provisions of the Competition in Contracting Act are unconstitutional. There are many other provisions of Title 31 of the United States Code which provide the Comptroller General with apparent authority to bind the Executive Branch; they include: (all citations are to sections of Title 31, U.S. Code)

- \$ 716 Availability of Information and Inspection of Records
- \$ 1112 Fiscal, budget, and Program information
- \$ 1304 Judgments, awards, and compromise settlements
- \$ 3301 General duties of the Secretary of the Treasury
- \$ 3323 Warrants
- \$ 3324 Advances
- \$ 3326 Waiver of requirements for warrants and advances
- \$ 3328 Paying checks and drafts
- \$ 3511 Prescribing accounting requirements and developing accounting systems
- \$ 3512 Executive agency accounting systems
- \$ 3513 Financial reporting and accounting system
- \$ 3514 Discontinuing certain accounts maintained by the Comptroller General
- \$ 3521 Audits by agencies
- \$ 3522 Making and submitting accounts
- \$ 3525 Auditing nonappropriating fund activities
- \$ 3526 Settlement of accounts
- \$ 3527 General authority to relieve accountable officials and agents from liability
- \$ 3528 Responsibilities and relief from liability of certifying officials
- \$ 3530 Adjusting accounts

Is it the Department's position that all of these provisions are similarly violative of the Constitution?

ANSWER: The Department construes all of these provisions to permit the Comptroller General to advise the Executive Branch on the subjects to which they pertain. Under the principles of Chadha, these provisions may not be construed to grant the Comptroller General the authority to bind the Executive Branch.

4. QUESTION: The Justice Department contends that "the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress." The Department also states that, although the President appoints the Comptroller General, he "has no statutory right to remove the Comptroller General, even for cause." The CG may be removed, of course, by joint resolution of the Congress, and a joint resolution cannot take effect unless it is signed by the President or re-passed over his veto. Does this provision of law constitute authority for the President to remove the Comptroller General from office, or does the President have any other explicit or implicit authority to remove him?

ANSWER: The only authority the President has with respect to the removal of the Comptroller General is the right to require (by his veto of a joint resolution removing the Comptroller General) that Congress remove the Comptroller General by a two-thirds vote, rather than a simple majority vote. This right in no way constitutes a power of removal in the President himself; it simply provides a narrow limitation on Congress's own removal power. As we previously indicated in response to question 6 of the first set of questions, we believe that Congress expressly intended the Comptroller General to be removable by Congress only and not by the President.

5. QUESTION: In 1980, then-Attorney General Benjamin Civiletti responded in writing to questions posed by Senator Max Baucus concerning the legal authority supporting the Justice Department's assertion that it can deny the validity of Acts of Congress. In that letter, the Attorney General cited the case of Myers v. U.S., and said,

"Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts . . . If the statute is unconstitutional, it is unconstitutional from the start."

Do you agree with this statement by Attorney General Civiletti?

ANSWER: Yes.

6. QUESTION: Civiletti went on to say in that letter, however, if I may paraphrase his statement, that if the President defies an Act of Congress, his action will be condemned if the Act is ultimately upheld. His own views regarding the legality or desirability of the statute do not suspend its operation and do not immunize his conduct from judicial control. He may not lawfully defy an Act of Congress if the Act is constitutional. This was the teaching of the near sequel of Myers, Humphrey's Executor v. U.S. In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the constitution that dispenses with the operation of the statute. The Executive cannot.

Do you agree with this statement by Attorney General Civiletti?

ANSWER: As we understand your paraphrasing of the statement, and in the context of the portion quoted in question 5 above, yes, we agree with it.

7. QUESTION: Generally, the federal courts give a presumption of constitutionality to Acts of Congress which they are called upon to review. However, the Supreme Court has held that some Acts raise such fundamental questions, such as the basic tri-partite structure of our government, that such a presumption will not be accorded. Do you believe that there is a basis in the decisions of the Court for not according a presumption of validity to the challenged provisions of the Competition in Contracting Act?

ANSWER: We believe that the same principles the Supreme Court applied in Chadha would be applied to the issues presented by the CICA. In the same way that the Supreme Court determined that the binding actions of a congressional committee in Chadha violated the basic tri-partite structure of our government, we believe the Supreme Court would determine that the purportedly binding authority granted by the CICA to the Comptroller General would be similarly unconstitutional.

8. QUESTION: You find the precedents for not executing the law and for not defending a law "inextricably intertwined," and thus fail to distinguish between challenging a law in court and deciding what to execute and what not.

None of the cases you cite in your letter to the Chairman of the Judiciary Committee establishes as a matter of law that the President, without the benefit of adjudication, may direct the federal agencies not to execute a law he has signed himself.

Please state why you believe the Executive's actions in this case are not unprecedented.

ANSWER: As we indicated in response to question two of the first set of questions above, the Supreme Court has never been called upon, and is not likely ever to rule, on the issue whether the Executive is justified in not implementing a statute pending review by a court. Once the case reaches a court, the issue is solely whether a statute is constitutional or unconstitutional. If the court determines the statute is constitutional then it would be improper for the Executive Branch not to implement the statute. On the other hand, if the statute is unconstitutional, then it would be improper for the Executive Branch to implement the statute. Thus, the President must make a determination with respect to what the Constitution requires, at least until the courts have finally adjudicated the question. There have been several instances in which the President has declined to implement or defend a statute based upon his conclusion that the statute is unconstitutional. The Myers case is one example, and other examples are cited in our letter to the Chairman of the House Judiciary Committee.

9. QUESTION: The Attorney General made no mention of the impoundment cases in his response to Chairman Rodino regarding previous instances of Executive refusal to execute an Act of Congress. Prior to enactment of the Congressional Budget and Impoundment Control Act of 1974, several Presidents, most recently President Nixon, refused to spend funds appropriated by Act of Congress and signed into law by the President. Apart from the fact that the impoundment cases involved appropriations and President Reagan's action involved general legislation, how, if at all, do you distinguish the impoundment cases from the instant case?

ANSWER: We do not believe that the impoundment cases are relevant to the issue presented by the CICA. President Nixon never made a claim that his failure to expend funds appropriated by Congress was required by the Constitution or that the appropriations acts were unconstitutional. He simply claimed that the Constitution gave him inherent authority to impound funds, a conclusion that several courts rejected. In this instance, however, the President has determined that compliance with the provisions of the CICA that purport to give binding authority to the Comptroller General would be unconstitutional. Thus, the Constitution, as the highest law of the land, requires that these provisions not be implemented. No such claim was ever made by the President in the impoundment cases.

Mr. BROOKS. Thank you, Mr. Horton.

Mr. Jensen, one other thing I wanted to put in the record at this point and also bring to your attention.

You may not have seriously considered the letter of January 31, 1985, from Chairman Peter Rodino of the Judiciary Committee, but since I serve as the ranking Democrat on that committee—

Mr. JENSEN. Yes.

Mr. BROOKS [continuing]. And look forward to continued relations with your Department, I thought you might want to look at that letter. I want to bring to your attention one paragraph.

This is addressed to former Attorney General William French Smith.

This paragraph says, "A unilateral Executive Branch decision to rule a statute unconstitutional and to refuse to comply with it on the basis of that ruling is a usurpation of a judicial power and a failure by the President to properly exercise his own constitutional duty to 'take care that the Laws be faithfully executed.' U.S. Constitution, Article II, Section 3. Until a judicial determination on the constitutionality of a statute, it is the responsibility of government officials, no less than average citizens, to comply with that statute." I would commend that to you.

[See appendix A, No. 3.]

Mr. BROOKS. I have one other question on a different matter, Mr. Jensen. In a pending lawsuit, the Paradyne Corp. is attempting to depose witnesses of this committee. The committee wants its counsel to be present in those depositions and make their objections, litigating the matter for themselves. The Justice Department will also have counsels at those depositions.

My question is: Would the Justice Department object to House counsel in their efforts to attend those depositions on behalf of the committee or will it tell witnesses to dishonor House counsel objections?

Mr. JENSEN. Well, as to the two issues—

Mr. BROOKS. Yes.

Mr. JENSEN. We have responded to Chairman Rodino by letter of February 22, 1985. We would be happy to provide that to you and any other kinds of—

Mr. BROOKS. I have a copy of that response.

Mr. JENSEN. As to the second issue, I think what we could do is expeditiously sit down and resolve that with you. I would like to get the factual circumstances, the dates, the times and everything so that we could talk—

Mr. BROOKS. I would urge you to get those facts and circumstances. I would also urge you to allow the House counsel to sit in, make objections for the committee, protect our rights. I'm sure that you all would do a good job of it, but this is just a little insurance, if you don't mind.

Mr. JENSEN. No, I appreciate that and we will talk with the litigation people immediately and see what answer we can provide to you.

Mr. BROOKS. All right. I would appreciate that.

We want to thank both of you for being here. You're gracious to come down. I'm sorry that it was a long morning for you.

Mr. JENSEN. Thank you very much, Mr. Chairman.

Mr. BROOKS. Our next witness is Lawrence R. Velvel. He is an attorney here in Washington recognized for his expertise in Supreme Court matters and constitutional law.

Mr. Velvel, we welcome your first appearance before the subcommittee. We appreciate your previous suggestions and evaluations for us. Your prepared statement will be made a part of the printed record. I have a couple of questions, if that would be adequate. Is there anything you wanted to add to that statement right now, sir?

STATEMENT OF LAWRENCE L. VELVEL, ATTORNEY AT LAW

Mr. VELVEL. Well, I have not prepared a written statement. I reflected on this a great deal, Mr. Chairman. I've read a great deal about this subject and reflected on it a good deal and tried to bring my 20 years of experience as a constitutional lawyer to bear on it.

Unfortunately, due to the press of business, I have not had time to prepare a written statement. I had planned to briefly point out some things to the committee that in the main had not been discussed by other witnesses or in other statements. And, if that's all right, I'll try to do that very quickly. I think it may prove helpful.

I will start by making a statement I'm reluctant to make about a position which has been prepared by constitutional lawyers as competent as those in the executive branch. I'm reluctant but I must nevertheless say I think the executive position verges on the frivolous here. In order to explain that, I will say that I am going to assume, for purposes of argument, that the executive is correct in saying that the Comptroller General is acting here as an arm of the legislature. I don't agree that he is doing so, but I'm going to assume it.

The Supreme Court has repeatedly said in recent years that we have three branches of Government which are not hermetically sealed from each other. They are not completely independent of each other and are not walled off by air tight compartments. And, if one branch seriously intrudes upon or seriously disrupts the work of the other, then there is a violation of separation of powers.

Well, is Congress really disrupting or intruding upon the executive here? What happens here is that the Comptroller General makes recommendations within 90 days concerning the protest. Now, he is also given the power to issue his recommendation in less than 90 days if he can, or to make it even earlier than might otherwise be possible if he regards the protest as frivolous.

The executive does not object to the recommendations and it does not object to the 90-day proviso. It welcomes recommendations made in 90 days. What it objects to is recommendations made in less than 90 days, recommendations made in 20 or 30 days, if possible, or even less if a protest is regarded as frivolous.

So, the executive is saying that in order to be constitutional a recommendation can be made only in 90 days and cannot be made more quickly if the Comptroller General is able to do so.

I would suggest that that is a frivolous position. It is also very hard to understand. How a recommendation in less than 90 days will intrude upon or harm the executive's procurement functions if a recommendation in 90 days, which the executive welcomes, will

not intrude upon or harm those functions is very hard to understand.

Furthermore, I think one should consider that, if one assumes the Comptroller General is acting as a legislative arm, then what we have here is something very much like a report and wait provision, involving a committee of Congress, to which the executive very properly has no objection whatsoever. This has been approved in the *Sibbach v. Wilson* case and again in the *Chadha* case.

Well, since this is similar to a report and wait provision, then certainly the Congress could tell one of its legislative arms, a committee or in this case the Comptroller General, to issue its recommendation in less than 90 days if it can. So, once again, I think the position taken by the executive makes little sense.

And, finally, I think you must consider that what we really have here, if one assumes, as the executive concludes, that the Comptroller General is acting as an arm of Congress, is simply a time limit, a procedural time limit, which Congress has put upon one of its own arms. It said to its own arm, if you can act faster than in 90 days, go ahead and do so.

Surely Congress has the power to provide time limits for its own arms and to tell them to act more quickly if they can do so.

I'm going to skip a certain portion of my remarks, Mr. Chairman, out of deference to your time problems, in which I was going to discuss the fact that if the executive really had any viable or worthwhile position here, what it would be objecting to is not the so-called lifting of a stay by issuing a decision in less than 90 days, but the power given to the Comptroller General in unique and unusual circumstances to take longer than 90 days to issue a decision.

I will not get into that except to say that, even were the executive to object to that, which it has not done strangely enough, it too would be constitutional for reasons I won't take time to discuss here.

A second very important reason why there is no intrusion upon the power of the executive here, even if the Comptroller is acting as an arm of the legislature, is this: The executive itself possesses the power to override the so-called stay. As the committee knows, and I won't belabor it, an executive agency can declare before an award is made, but within 30 days of the award, that compelling and urgent circumstances require the award, and thereby it overrides the stay. And, incidentally, there is nothing at all in the statute which prevents the executive's bid process from going forward while a stay is in process. So, while a stay is in being, the bid process can go forward until you are within the 30-day period and then the executive can make its overriding declaration of urgent and compelling circumstances.

And, as you know, after an award is made, the executive can again override a stay by simply saying it's in the Government's interest to do so.

The last point on the frivolity of the executive's position concerns the fees rather than the stay. Despite the *Chadha* case, there is one argument which can be made that, even if the Comptroller General is a legislative arm, the Comptroller General could nevertheless require the awarding of fees.

And this point that I'm about to make, while it is not necessarily the strongest point imaginable, was very clearly recognized in Justice Powell's concurring opinion in *Chadha*, both in footnote 1 and especially in footnote 9 and the accompanying text.

We have here a situation where, in awarding fees, the Comptroller General is doing something which is the very opposite of the concerns which in part have given rise to the separation of powers and to the bill of attainder clause.

Those concerns were that Congress would burden or hurt specific individuals. The Comptroller General is not doing that when he awards fees. He is helping and benefiting particular individuals, so that the *Chadha* case and the bill of attainder cases are clearly distinguishable, and the fact that the rights of people outside the Congress are being affected may not necessarily be dispositive.

Now, I have thus far accepted the executive's assumption or conclusion that the Comptroller General is acting as an arm of the Congress.

Now I want to question whether that assumption is correct. I think it is not correct. There are arguments both ways, but I think by far the stronger arguments are that the executive's conclusion is incorrect. Before this committee I have noticed that most of the discussion has been in terms of whether the Comptroller General is either an arm of the Congress or an arm of the executive.

Frankly, I think he's neither. I think the tenable position is that the Comptroller General is acting as an independent agency for the purposes under discussion. He is acting as part of the fourth branch of Government, and as an officer of the United States.

And I think that is the position which will be upheld in the courts. As an independent agency, the Comptroller General can do all of the things the statute requires him to do. He can rule on whether rules of law and procedure have been followed or broken. He can lift stays, he can award costs, and so forth. He is acting, when he does these things, in an enforcement and judicial capacity, a quasi-legislative and quasi-executive capacity that has repeatedly been recognized as appropriate by the Supreme Court in cases such as *Buckley* and others.

And there's no question in my mind that that is what he is doing.

Mr. BROOKS. I'm sure that you can revise this testimony—I have some questions which I hope you can answer for the record, if you will. I would submit those, and I want to thank you very much. Mr. Horton.

Mr. HORTON. I have no questions. Thank you for coming.

Mr. BROOKS. We appreciate your contribution to the hearing, and we want to thank you very much for that. Without objection, the record will remain open for the inclusion of additional statements, documents and other evidence relevant to the subject matter of these hearings.

This concludes today's hearings on the refusal of the executive branch to comply fully with provisions of the Competition in Contracting Act. I initially suspected that these actions were taken merely to obstruct the implementation of the act. However, after 2 days of testimony it's clear that there's a far more important issue facing the Congress. President Reagan's decision to declare a por-

tion of a public law unconstitutional and then refuse to enforce it strikes at the very heart of our constitutional form of government.

In effect, the President is attempting to execute the powers of all three branches of Government. After signing the bill into law, he assumed the role of the legislative branch by unilaterally reversing that law to accommodate his view of the Constitution. The President then assumed the role of the judiciary by unilaterally declaring that his action was constitutional.

In effect, the President is declaring that he has the right to unilaterally revise or rescind any law which is inconsistent with his interpretation of the Constitution. In my opinion, no amount of rationalization by the Attorney General can justify this position. The Competition Act was duly enacted by the Congress and signed into law by President Reagan in accordance with constitutional requirements. It is the law of this land, and Congress must exert its power to see that it's fully carried out.

I want to thank all of the witnesses for taking the time to assist the subcommittee in this important issue. The hearing is adjourned.

[Whereupon, at 12:30 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIXES

APPENDIX A.—PERTINENT MATERIAL SUBMITTED FOR THE RECORD

1. December 12, 1984, joint letter from Chairman Jack Brooks, Rep. Frank Horton, Senator William S. Cohen, and Senator Carl Levin to members of the Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council, with January 10, 1985, response

Congress of the United States

Washington, D.C. 20515

December 12, 1984

Mr. Allan W. Beres
Assistant Administrator
Office of Acquisition Policy
General Services Administration
18th and F Streets, N.W.
Washington, D.C. 20405

Dear Mr. Beres:

As you know, the General Accounting Office has established an interdivisional procurement task force, at our request, to oversee both the regulatory implementation of and subsequent agency compliance with the Competition in Contracting Act (CICA), P.L. 98-369.

The GAO task force recently completed its initial review of the proposed CICA changes to the Federal Acquisition Regulation and found that the proposed regulations generally reflect the statute, except for the problem areas discussed below.

In these areas, the GAO task force found that the proposed regulations either do not comport with the statutory requirements or do not provide sufficient guidance, thus inviting unnecessary supplementation. The discrepancies between legislative intent and executive implementation result, in almost all cases, from an apparent disregard for the Conference Report (98-861), which gives direction to those responsible for issuing the regulations.

We are concerned that, unless revisions are made to the proposed regulations, the purpose of CICA -- to enhance competition and strengthen the restrictions on unnecessary sole-source contracting -- will not be fully realized.

The following is a preliminary list of proposed FAR provisions which we strongly believe need revision in order for the regulations to be compliant with the statute. These changes should be incorporated in the regulations before they are issued in final:

Identical letter sent to:

Mary Ann Gilleece
Deputy Under Secretary
(Acquisition Management)
Department of Defense

S. J. Evans
Assistant Administrator
for Procurement
National Aeronautics and
Space Administration

Mr. Allan W. Beres
December 12, 1984
Page Two

- FAR 6.302-1(b) cites examples in which the first exception to the requirement for full and open competition may be used. Under the first example (FAR 6.302-1(b)(1)), however, the condition for going sole-source -- "the required supplies or services are available from only one source" -- is clearly less restrictive than the statutory exception, which requires as a further condition that no other type of property or services will satisfy the agency's needs.
- The treatment of follow-on contracts and unsolicited proposals -- listed as the second and third examples, respectively, under the first exception -- is equally troubling. As currently written, these examples do not limit the sole-source award in either case to the conditions specified in CICA. Since the proposed regulations state that the list of examples is "not intended to be all inclusive," a contracting office may attempt to justify a sole-source award of follow-on contracts or unsolicited proposals unrelated to the specified conditions, which is not authorized under CICA.
- The remainder of examples under the first exception seek to create broad categories for sole-source award which are not authorized under CICA. Determinations and decisions required to use this exception are to be made on a case-by-case basis pursuant to the criteria provided. See related problem with FAR 6.303-1(c).
- The FAR provisions do not reflect our intent, as expressed on page 1426 of the Conference Report, that noncompetitive follow-on contracts are to be limited to those awarded after (1) an original competitive award and (2) a cost-benefit analysis is conducted to determine and document whether the initial capital investment could cause substantial duplication of cost if the contract were awarded to other than the original source, or whether such cost could be offset by savings resulting from competition.
- FAR 6.302-1(c)(2) provides that for contracts awarded under the first exception, the notices required by FAR 5.201 "shall have been published and any bids or proposals must have been considered." The FAR, does

Mr. Allan W. Beres
 December 12, 1984
 Page Three

not, however, provide additional guidance regarding what constitutes "consideration." The Conference Report states on page 1427 that "agencies should, at a minimum, give each bid or proposal...sufficient consideration so as to be able to make an informed judgment about the responsibility of the bidder and the responsiveness of the bid."

- Under CICA, an executive agency may not "procure property or services from another executive agency unless such other executive agency complies fully with the requirements of this title." This provision is included, according to page 1428 of the Conference Report, "to prevent one agency from acquiring its goods and services from another agency's sole-source contract without having to justify a non-competitive procurement itself." FAR 6.303, which covers the justification requirements for using procedures other than competitive procedures, should incorporate that provision.
- FAR 6.303-1(c) permits justifications relating to the first six exceptions from competitive procedures to be made on a class basis. Again, this provision runs contrary to our stated intent that "all determinations and decisions required for use of the exceptions to competitive procedures...are to be made on a case-by-case basis. Broad categories or classes of products and services cannot be exempt from competitive procedures." See page 1427 of the Conference Report.
- FAR part 7 deals with acquisition planning. The pre-dominant emphasis seems to be on acquisition planning for relatively complex or high-dollar procurements. We believe that this part should be revised to provide guidance for other than complex or high-dollar procurements. The Conference Report states on page 1429 that the planning requirements in CICA apply to all procurements -- competitive and noncompetitive.
- FAR 10.002(6) requires that defense agencies include descriptions of agency requirements, whenever practicable, to be stated in terms of functions to be performed or performance required. This preference for functional or performance specifications over detailed design specifications is applicable government-wide, rather than just to defense agencies.

Mr. Allan W. Deres
 December 12, 1984
 Page Four

- FAR 13.000(a) provides for a \$10,000 small purchase threshold for civilian agencies, which was increased to \$25,000 under the Office of Federal Procurement Policy Act Amendments of 1983 (P.L. 98-191). Below this threshold, FAR 13.103(a) states that small purchase procedures shall be used to the maximum extent practicable. This provision fails to emphasize CICA's requirement that "in using small purchase procedures, an executive agency shall promote competition to the maximum extent practicable." The regulation should reflect that requirement.
- FAR 15.804-2(a)(2) states that there are "relatively few instances" where certified cost or pricing data and inclusion of defective pricing clauses would be justified in awards between \$25,000 and \$100,000. While certified cost or pricing data are not required for negotiated contracts under \$100,000, contracting officers are authorized under CICA to obtain such data and should not be discouraged from doing so, especially considering the spare parts problems.
- For contracts under \$25,000, moreover, FAR 15.804-2(a)(2) states that "the contracting officer shall not require certified cost or pricing data." This prohibition simply has no basis in statute.
- FAR 15.5, which deals with unsolicited proposals, needs to be revised to (1) limit noncompetitively awarded unsolicited proposals to those involving research, (2) define or provide guidance for applying the concept of "unique" referred to in 15.502, 15.503(c)(1), 15.506-2(a)(1), 15.507(a)(3), etc., and (3) place limitations on information that may be disclosed to only one or a few select potential contractors when others could also meet the agency's needs.
- FAR 19.502-2 retains the "Rule of Two" provision, which we believe is no longer appropriate under CICA. The minimal standard for competition established by the "Rule of Two" provision runs contrary to section 16 of the Office of Federal Procurement Policy Act, as amended by CICA, which requires agencies "to increase the use of full and open competition...by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or proposals from responsive sources..." The Conference Report clearly states on page 1434 that this requirement applies to "all agency procurements, including those made under set-aside programs."

Mr. Allan W. Beres
December 12, 1984
Page Five

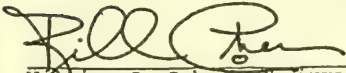
- The FAR does not incorporate the record requirements in CICA, which amend section 19 of the Office of Federal Procurement Policy Act. These provisions are required to be implemented on a government-wide basis.
- Finally, the proposed FAR changes, of course, need to be revised in accordance with the provisions of P.L. 98-577 and P.L. 98-525.

In addition to these problem areas, attached is a list of other issues which the GAO task force believes need revision.

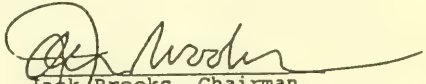
Given the size and importance of the task, we commend the Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council for their diligent efforts.

We appreciate your continued cooperation, and request that you provide us with your specific plans to revise the regulations.

Sincerely,



William S. Cohen, Chairman
Subcommittee on Oversight of
Government Management
Senate Committee on Govern-
mental Affairs



Jack Brooks, Chairman
House Committee on Govern-
ment Operations



Carl Levin
Ranking Minority Member



Frank Horton
Ranking Minority Member

Attachment

cc: Mr. William B. Ferguson
Chairman, Civilian Agency Acquisition Council

ATTACHMENT

ATTACHMENT

ADDITIONAL ISSUES RELATING TO THE FAR REGULATIONS
IMPLEMENTING CICA

1. FAR 5.002 (page 12). Suggest deleting the phrase "offering competitive opportunities for contractors and subcontractors." This phrase has been widely interpreted by contracting officials as requiring publicizing of contract actions only when they decide that competitive opportunities exist. (See GAO/PLRD-82-40, especially pages 30 and 31.)
2. FAR 5.202(a)(1) (page 13). Suggest revision to provide for the exception when "the synopsis for a contract action cannot be worded to preclude the disclosure of information which would compromise the national security. The fact that a contract action involves classified information does not, in itself, justify an exception."
3. FAR 5.202(a)(7) (page 13) needs clarification. Do the last four lines apply to proposals under SBIDA, too?
4. FAR 5.203(c) (page 14). Suggest that the words "unilateral sole-source" be eliminated.
5. FAR 5.301, line 4 (page 16). Suggest adding "any" before the word "subcontracts," per CICA, section 2732, amending section 18(a)(1)(B) of the OFPP Act.

ATTACHMENT

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6. FAR 6.003 (page 19). Suggest revising the definition of full and open competition by adding the words "submit sealed bids or competitive proposals and" before the word "compete".

7. FAR 6.303-2(a)(6) or (8) (page 23). Suggest adding at the end of this provision such words as, "including whether a CBD notice was publicized as required by FAR 5.2 and, if not, which exception under 5.202 applies." Otherwise, when publication of a CBD notice is not mentioned in the justification, reviewers will not know from reading it whether such notice was publicized.

8. FAR 6.303-2(9)(ii), line 2 (page 23). Suggest adding "to the government" after "cost". (See FAR 6.302-1(b)(2) and CICA sections 2711 and 2723(d)(1)(B).)

9. FAR 6.304(a)(1) (page 23). Suggest that the floor (i.e., the lowest dollar amount) to which this requirement applies, presumably \$25,000, also be cited.

10. FAR 7.101 (page 25, definition of market survey). It is not clear how the phrase "and the results of any market test recently undertaken" fits in. Suggest wording clarification.

11. FAR 8.403-2 (page 33). Contained a FAR revision adding a new second sentence, "All responsible offerors may submit offers in response to a solicitation for multiple-award schedule contracts." But the FAR instructions deleted this revision. Suggest that this revision be retained. (See CICA section 2711 amending FPASA section 309(b)(3) and CICA section 2721 amending 10 U.S.C. 2302(2)(C).) It is not clear why this revision was deleted.

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12. Has FAR 9.2 (pages 34 and 35, revised) and FAR Part 11 (starting on page 39, revised) been revised to be consistent with Public Law 98-577 and, to the extent appropriate, the DOD fiscal year 1985 authorization act?
13. FAR 10.002(a)(4) (page 37). Obviously, something is missing here.
14. FAR 13.103(b), last line (page 42). Suggest "the use of" replace the words "negotiation under".
15. FAR 13.204(c) (page 45, revised). Suggest the proposed FAR revision be deleted. The earlier wording appears to be more appropriate.
16. FAR 14.101(e) (page 49). Suggest the "and" before "other factors included" be deleted.
17. FAR 14.103-2 (page 49). Suggest "unless" be added after sealed bidding.
18. FAR 14.104, line 2 (page 49). Suggest changing "formal advertising" to "sealed bidding". Also see FAR 14.501, line 2 (page 65).
19. FAR 14.201-7(b)(1), line 1 (page 52). Suggest adding "sealed bidding" after "by".
20. We could not find some of the information in FAR references. For example:

--FAR 14.203-1 (page 55) refers to 5.102(c)(1).

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--FAR 14.404-1(e)(1) (page 59) refers to 15.103, which is "reserved".

--FAR 36.103(a) (page 143, revised) refers to 6.003(a) and 6.003(b)(2).

--FAR 36.601 (page 147, revised) refers to 6.102(c)(1).

--FAR Subpart 38.1 (page 150, revised) shows a paragraph (c) to be inserted (but it does not indicate where). The insert refers to FAR 6.103.

21. FAR 15.502 (page 75). FAR policy only addresses unsolicited research proposals, but the definition of unsolicited proposal is not limited to research. (Also, see comment number 1 on page 1 and comment number 11 on page 9, above.)

22. FAR 15.503(c)(5) (page 75). The meaning of "documented" is unclear. Will this wording permit noncompetitive awards simply because known requirements were not "documented" in some specific way defined by agencies' internal procedures?

23. FAR 15.1001(a) (page 96). Suggest adding the word "promptly" before "notify". (See CICA, section 2711 amending FPASA section 303B(d)(4) and CICA section 2723 amending ASPA section 2305(b)(4)(D).)

24. Should FAR 17.6 be revised based on CICA? For example, see 17.604(c).

25. FAR 19.502-4(a) (page 114). Suggest "Whenever possible" be changed to "Whenever appropriate".

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26. FAR 34.002(b) and FAR 35.005-1(a) (page 139). Suggest that the references to "effective" competition be deleted (while retaining the references to Part 6 and full and open competition).

27. FAR 44.302(a) (page 153) deletes some wording relating to modifications. It is not clear why.

28. FAR Part 52, table of contents, item 52.214-3 (page 162). Why is "Invitations for Bids" changed to "Request for Sealed Bids"?



OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON D.C. 20301 -3060

RESEARCH AND
ENGINEERING
(AM)

JAN 10 1985

Honorable Jack Brooks
Chairman, House Committee on
Government Operations
House of Representatives
Washington, D.C. 20515

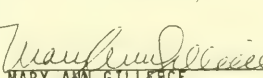
Dear Mr. Chairman:

Thank you for your kind comments regarding the excellent work accomplished to date by the Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council in implementation of Public Law 98-369 (CICA). As pointed out in your letter our work is not yet complete. However, we wish to assure you that our intent in drafting implementing regulations was to enhance competition and strengthen the restrictions on unnecessary sole source contracting.

In view of the very stringent provisions of the Act with regard to the effective date of the new regulations, we must adhere to our original implementation plan to be totally prepared on April 1, 1985, to begin operations under CICA. The two FAR Councils will consider and reconcile your comments at the time all of the comments on the temporary regulation are being considered. Continued dialogue between our staffs will enhance our understanding of your concerns. Thank you for your interest and participation in improving the acquisition process.

Sincerely,


ALLAN W. BERES
Assistant Administrator
for Acquisition Policy
General Services
Administration


MARY ANN GILLETTE
Deputy/Under Secretary
(Acquisition Management)
Department of Defense


S. J. EVANS
Assistant Administrator
for Procurement
National Aeronautics
and Space Administration

cc: Senator William S. Cohen
Senator Carl Levin
Congressman Frank Horton

2. January 16, 1985, GAO letter report (B-208159.5) containing plans for implementing bid protest provisions of the Competition in Contracting Act and final Bid Protest Regulations (3 attachments).



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-208159.5

January 16, 1985

RECEIVED

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

JAN 17 1985
HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

Dear Mr. Chairman:

In a letter dated August 1, 1984, written jointly with Senators William S. Cohen and Carl Levin and Representative Frank Horton, you requested, among other things, that this Office report to you on our plans for implementing the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), Pub. L. 98-369. This responds to your request. This letter also transmits to you our final Bid Protest Regulations as published in the Federal Register on December 20, 1984. See Enclosure 1.

Section 2741 of CICA authorizes the Comptroller General to decide protests filed by interested parties concerning solicitations, proposed awards or contracts for property or services procured by federal agencies. Although this Office has been issuing decisions on protests for many years under its authority to determine the legality of public expenditures, 31 U.S.C. § 3526 (1982), CICA establishes for the first time an express statutory basis for such decisions. In addition, CICA contains a number of features not a part of our current protest procedures and establishes strict time limits for the issuance of our decisions. The object is to create an efficient and effective process for ensuring that government contracts are awarded in a manner consistent with the requirements of law.

The passage of CICA caused us to review closely every aspect of our bid protest function and to make a number of significant changes. This letter will summarize our efforts. We have included attachments that provide additional details.

B-208159.5

Personnel

CICA requires that we issue our decisions on bid protests within 90 working days of when a protest is filed. Cases handled under express option procedures must be decided within 45 calendar days. In order to meet these deadlines in every case, we will need to reduce considerably the average time it currently takes to issue our decisions.

When this Office receives a bid protest, the case is assigned to a writing attorney, who is responsible for drafting a proposed decision. In some cases, such as when a protest is untimely, beyond our jurisdiction, or clearly without merit, the attorney begins drafting the decision immediately. In most cases, however, we request the contracting agency to prepare a report on the merits of the protest and invite the protester to comment on the report. In a few cases, we hold an informal conference to discuss the issues raised. Once the case is fully developed, the attorney drafts a decision. In all cases, the writing attorney submits the proposed decision to a reviewing attorney who reviews both the style and content of the draft. The reviewer then submits the draft to an Assistant General Counsel.

We analyzed the various reasons why issuing decisions on protests currently takes as long as it does. One reason is the size of our professional and support staff. Although management and other changes will help in processing the cases more quickly, we concluded that in order to meet the statutory deadlines--even with no increase in caseload--we would have to increase our staff.

We have increased our procurement law professional staff. We accomplished the increase by hiring attorneys and by reassignment from other sections of the Office to our Procurement Law section. Also, we are in the process of hiring additional support staff.

B-208159.5

Management

We have just completed a reorganization of the Procurement Law section of the Office of the General Counsel. The new structure is designed to provide more day-to-day supervision of the cases and to allow for greater flexibility should our caseload rise substantially once the CICA bid protest provisions become effective.

We are also changing the signature level for some of our decisions. Currently, proposed decisions are signed by either the General Counsel or the Comptroller General. In the future, cases that on their face do not state a valid basis of protest or that raise issues beyond our jurisdiction, as well as the more routine cases that we decide on the merits, will be signed below the General Counsel level.

Training

We developed a comprehensive program to familiarize all our procurement law staff with CICA and the implementing regulations. The program is designed to serve the needs of all our attorneys, regardless of level of experience.

In November, we held a course for all new attorneys to instruct them on the basic principles of procurement law and to acquaint them with such matters as case management, law library resources and computerized research. All of our attorneys, regardless of experience, as well as the staff of our Procurement Law Control Group, will be required to attend training sessions on CICA and on our new regulations. These sessions are scheduled for the second week of January. In addition, those attorneys who have not attended a legal writing course within the past 4 years will be required to do so. We will also offer computer research and word processing training to all interested staff members.

Finally, our recent reorganization means that a number of our more senior attorneys for the first time will have management responsibilities. We have requested our

B-208159.5

Office of Organization and Human Development to conduct training sessions for these attorneys to assist them in developing the kinds of interpersonal and other skills they will require.

Equipment

We are currently in the process of replacing our various paper-based record keeping systems with an automated case tracking and management information system. The new system, designed under an interagency agreement with the Department of Labor as supplemented by GAO contracts, will provide us with an efficient and accurate means of tracking each case as it proceeds through the Office, for preparing various management reports, and for generating the statistics needed to comply with the reporting requirements of CICA. Parts of this system are already in place and training of personnel has begun.

We plan to obtain a dedicated microprocessor that will be used to generate various forms and letters. This computer will be particularly useful for the summary disposition of protests raising issues that are frivolous, untimely or beyond our jurisdiction. In addition, we plan to acquire a second microprocessor that will better enable procurement law attorneys to analyze pricing or cost data, simulate agencies' computerized evaluation models, and process some of our more complex cases.

Finally, we plan to obtain more word processors, to continue to develop our computerized research capabilities, and to experiment with facsimile transmission of protest documents. We have, in fact, entered into an agreement with the Army Materiel Command (AMC) under which they will install a facsimile machine in our Office to transmit protest documents between our Office and AMC.

Bid Protest Regulations

The Act requires this Office to prescribe procedures for the expeditious resolution of bid protests. This process, described below, was completed on December 20

B-208159.5

with the publication in final form of our Bid Protest Regulations. 49 Fed. Reg. 49417 (1984) (Enclosure 1).

Work began on our new regulations immediately after Congress passed CICA. Recognizing that successful implementation of the Act will require a high degree of cooperation between this Office and the contracting agencies, we consulted representatives from the major procuring agencies to discuss the protest requirements of CICA and how best they might be implemented. A team of GAO senior attorneys, under the direction of the Associate General Counsel for Procurement Law, drafted proposed regulations (Enclosure 2). Basically, we retained the format and substance of our current procedures (Enclosure 3), modified, of course, to reflect the requirements of CICA. We published the proposed regulations in the Federal Register on September 17 and invited interested parties to submit their comments by October 17. On October 10, we hosted a meeting of representatives from more than a dozen contracting agencies to discuss the proposed regulations. Members of my staff appeared before various professional groups for the same purpose.

We received 23 comments on our proposed regulations. We fully considered all of these comments and, where appropriate, revised our final regulations to accommodate the views expressed. For example, many of the comments we received concerned the requirements for filing protests and serving protest copies. Some commenters objected to the proposed service requirement as being unduly complex, while the contracting agencies were concerned primarily that the requirement would not ensure that an agency would receive a copy of the protest soon enough. Our final regulations delete the service requirement and substitute instead a requirement that a protester provide the contracting agency with a copy of the protest within 1 day of filing at GAO. In addition, our regulations require a protester to provide us with an additional copy of its protest which we will make available to the agencies in Washington, D.C. We also clarified our responsibility to notify the agency by telephone within 1 day of the filing of a protest.

B-208159.5

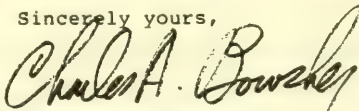
Further examples of changes made in our final regulations concern the classes of protests that GAO will not consider, such as protests regarding matters within the purview of the Small Business Administration, challenges to affirmative responsibility determinations, and issues in litigation. Further in this connection, we revised the proposed section 21.1(a) to provide that after a particular procurement has been protested to the General Services Administration Board of Contract Appeals, no protests by any party regarding that procurement will be considered by our Office while that initial protest is before the Board.

We also revised the proposed language with regard to when we would recommend that a successful protester recover bid or proposal preparation costs and the costs of pursuing the protest, including reasonable attorneys fees. The final regulations state at section 21.6(e) that we will allow recovery of the costs of pursuing a sustained protest except where we recommend that the protested contract be awarded to the protester and the protester receives the award. Also, the section has been revised to include the standard, adopted from language in the Conference Report on the Competition In Contracting Act, that recovery of the costs of pursuing a protest and of bid and proposal preparation will be available only where the contracting agency unreasonably excluded the protester from the procurement. See Conference Report on the Competition In Contracting Act Of 1984, H. Rep. No. 98-861, at 1437 (June 23, 1984).

Periodically, as we gain experience under CICA, we will review our operations. We may have them reviewed also by knowledgeable persons outside this Office. We will adjust our operations as needed to ensure that the purposes of CICA are achieved.

We trust the above summary of our efforts to implement the bid protest provisions of the Competition in Contracting Act of 1984 is responsive to your request.

Sincerely yours,



Comptroller General
of the United States

Enclosures

Attachment I

Billing Code 1610-10

Title 4 - Accounts

CHAPTER I - GENERAL ACCOUNTING OFFICE

Part 21 - GENERAL ACCOUNTING OFFICE - BID PROTEST
REGULATIONS

AGENCY: General Accounting Office

ACTION: Final rule.

SUMMARY: These rules reflect adoption of and amendments to the General General Accounting Office's proposed rules published September 17, 1984 (49 Fed. Reg. 36386), implementing section 3551-3556 of title 31, United States Code (as added by section 2741 of the Competition In Contracting Act of 1984 (Pub. L. 98-369) and respond to comments submitted. They are designed to provide the framework for the consideration of bid protests by the General Accounting Office.

Effective Date: January 15, 1985.

For Further Information Contact: John Brosnan, Senior Attorney, General Accounting Office, by telephone (202) 275-5476.

Supplementary Information: The General Accounting Office's proposed rules were the subject of 30 days public comment. In light of the comments received, several changes are made.

The Comments

Twenty-three comments were received on the proposed rules. The following is a discussion of the principal

issues raised in the comments and the General Accounting Office's response thereto.

Section 21.0(d) defined "days" in the regulations as working days of the federal government. One commenter suggested that GAO explain how days would be counted for the purpose of calculating the various time limits prescribed by the regulations. In response, section 21.0(d) has been revised to provide the method by which such periods of time will be calculated. Also, GAO has revised section 21.0(d) to state that section 21.4, concerning withholding of contract award and suspension of contract performance, is excluded from the general rule that the term "days" means government working days, because section 21.4 repeats for informational purposes language from the Competition In Contracting Act of 1984, Pub. L. 98-369 (Competition in Contracting Act).

Another commenter suggested that the section 21.0(e) definition of "adverse agency action" be revised to include bid opening and receipt of proposals as examples of adverse agency action. The section has been so revised.

Several commenters suggested that GAO clarify questions regarding the joint jurisdiction of the General Services Administration Board of Contract Appeals and GAO concerning protests of Brooks Act procurements for automated data processing equipment and services. Under section 3552 of the Competition In Contracting Act, a party who files a protest

with the Board may not later file a protest with respect to that procurement with GAO. Section 21.1(a) contained similar language. In response to the comments, GAO has expanded the section 3552 prohibition to cover all protests filed with respect to a particular procurement. Thus, to avoid an undesirable fragmentation of remedies, section 21.1(a) has been amended to provide that after a particular procurement has been protested to the Board no protests by any party regarding that procurement will be considered by GAO while that initial protest is before the Board.

Several federal agencies have suggested that section 21.1(c), describing the elements of a protest, be amended to require that protests include a citation of the specific statute or regulation the protester contends the agency violated. GAO recognizes that the Competition In Contracting Act describes protests as concerning alleged violations of procurement statutes or regulations. A requirement that protesters cite the particular statute or regulation allegedly violated seems unnecessary, however, where a protester clearly describes the basis of protest. GAO would not want to dismiss a protest merely because a statute or regulation has not been cited.

Many commenters requested changes in the scheme contained in sections 21.1 and 21.2 regarding filing of protests and the service of protest copies. Section 21.2(b)(1) stated that a protest would not be considered

filed at GAO until it was received in GAO's Procurement Law Control Group. That section also required that the protest include evidence of service upon the contracting activity and contracting agency. Section 21.2(b)(2) provided that service could be accomplished by delivering the protest in person or by sending the protest by certified, first-class or overnight mail. Section 21.2(b)(3) required that the protest contain a certificate of service. Also, other sections contained corresponding requirements. Section 21.1(c), describing the content of a protest, required that a certificate of service be included in the protest. Section 21.3(c) required the contracting agency to serve its report in the same manner that protests were to be served. Also, section 21.3(e) and section 21.6(c) (now section 21.5(c)) required copies of comments to be "served."

Some commenters complained that the requirement in section 21.2(b)(1) that protests be specifically received in GAO's Procurement Law Control Group placed too great a risk of late filing on protesters and that the requirement in section 21.2(b)(2) for a certificate of service was unduly complex. The contracting agencies complained primarily that depositing a copy of the protest in the mail did not insure that the agency would receive it soon enough.

In response to these suggestions, GAO has changed section 21.2(b)(1) so that a protest is to be deemed filed if received in GAO itself, rather than in the Procurement

Law Control Group. The service and certificate of service requirements of sections 21.2(b)(2) and (3) have been eliminated. Instead, a new section 21.1(d) has been added which provides that a copy of the protest must be received by the appropriate agency official or location within 1 day after the protest is filed with GAO. Rather than the more formal certificate of service, the protest must state that a copy has been or will be provided promptly to the agency. The burden is on the protester to get the copy of its protest to the agency within a day of filing at GAO. After GAO notifies the agency that a protest has been filed, the contracting agency should inform GAO if it has not received the protest document. The agency can facilitate timely receipt of a copy of the protest by providing in their solicitations notice designating where the protest copy should be furnished.

Section 21.1(c)(2) has also been amended to require that a copy of the protest along with the original be filed with GAO. The additional copy can be made available by GAO to contracting agencies in Washington, D.C.

Finally, sections 21.1(c), 21.3(c) and (e), and 21.5(c) have been amended to conform to these revised requirements.

Section 21.3(a) provided that GAO would notify the contracting agency within 1 day of the filing of a protest. Several commenters suggested revising the section to specify precisely how notification would be made. The section has

been revised to state that GAO shall notify the contracting agency by telephone within 1 day of the filing of a protest, and shall promptly mail a written confirmation of the notice. Telephone notice is the only practical way to comply with the Competition In Contracting Act's requirement that GAO notify the contracting agency within 1 day of the filing of a protest. Further, section 21.3(c), concerning the time for filing the agency report, has been revised to state specifically that the 25-day period for filing the report begins to run from the date of telephone notice.

GAO received several comments on section 21.3(b), which provided that material submitted by a protester will not be withheld from the contracting agency or interested parties except as permitted or required by law or regulation. One commenter felt that the provision should specifically state the type of information that may be withheld and the laws or regulations that might apply. Another commenter felt that anyone requesting information should be required to pay for it. After consideration of these comments, the GAO has decided to retain the language of the proposed provision. That language is identical to the language of the corresponding provision of our current procedures. 4 C.F.R. § 21.3(b) (1984). The provision has proven to be clear and fair.

GAO has eliminated section 21.5, which stated the circumstances in which agencies must provide relevant protest-related documents to interested parties, and incorporated the substance of that provision into section 21.3(c). Sections 21.6 through 21.13 were renumbered accordingly. This provision gives protesters and other interested parties the right to receive copies of the agency report and relevant documents that would not give the party a competitive advantage, and that the party is otherwise authorized by law or regulation to receive. If documents are withheld the report must contain a list of withheld documents.

Some commenters felt that section 21.3(c) required agencies to furnish copies of documents to a party that the party already had in its possession. The provision has been revised to require only copies of "relevant documents," "as appropriate."

Two commenters expressed concern that in protests of overseas procurements agencies could not file reports within the 25-day requirement of section 21.3(c). Nevertheless GAO has decided not to revise section 21.3(d) regarding time extensions to automatically waive the 25-day period for overseas procurements. The 25-day period is mandated by the Competition In Contracting Act for all protests and extensions are to be granted on a case-by-case basis in exceptional circumstances.

A few commenters felt that protests should not necessarily be dismissed for failure of the protesters to file comments, a request for an extension of time, or a request that the case be decided on the existing record as required by section 21.3(e). The GAO has decided not to amend this section. The requirement does not seem burdensome. A protester is required to indicate its continued interest in the protest so that the procurement is not further disrupted and GAO resources are not wasted by the continuation of a protest in which the protester no longer is interested.

A typographical error in section 21.3(f) has been corrected. The reference to section 21.2(d) has been changed, to the proper reference, section 21.2(c).

Section 21.3(f)(2), concerning GAO review of Small Business Size Standards, has been revised to include specifically protests of standard industrial classifications among matters that the GAO will not review.

Section 21.3(f)(3), which stated that the Small Business Administration (SBA) makes final dispositions of contracting officer determinations that a small business firm is not responsible, has been revised to make it clear that the SBA does not conclusively certify a lack of responsibility. The section has also been revised to reflect the current language of GAO cases concerning the limited circumstances in which the GAO will review certificate of competency decisions.

Two comments were received on section 21.3(f)(4), which stated that GAO would not review the decision to effect a set-aside under section 8(a) of the Small Business Act or the decision to award an 8(a) subcontract, absent a showing of possible fraud or bad faith or that regulations were violated. One commenter suggested that the term "Set-Aside" be eliminated from the title to avoid confusion with the small business set-aside program under section 15 of the Small Business Act. That commenter also suggested that the language setting forth the exceptions under which the GAO would review section 8(a) actions be amended by changing the word "regulations" to "Federal Acquisition Regulation." The commenter felt that the SBA should handle protests of violations of SBA regulations.

The other commenter suggested revising the section to include set-asides under sections 9 and 15 of the Small Business Act as set-asides not reviewable by GAO, due to the discretion granted by statute to SBA. The commenter also suggested eliminating violation of regulations as an exception permitting review by GAO.

The section has been revised to eliminate the word "Set-Aside" from the title, and to state that the decision not to place, as well as to place, a procurement under the 8(a) program would not be reviewed by GAO absent the stated exceptions.

Section 21.3(f)(5), concerning GAO review of affirmative determinations of responsibility, has been revised to state specifically that it refers to affirmative determinations of responsibility by the contracting officer to distinguish it from SBA certificate of competency actions.

Section 21.3(f)(8), which provides that GAO will not review procurements by agencies other than federal agencies, has been revised to include nonappropriated fund activities as an example of an entity other than a federal agency.

Section 21.3(f)(9), concerning nonappropriated fund activities, has been eliminated as a separate section. As a result, section 21.3(f)(10) has been renumbered section 21.3(f)(9).

Section 21.3(f)(10) has been added stating that GAO will not consider most subcontractor protests. The section also sets forth the circumstances in which GAO will review protests of subcontract awards. This section changes GAO's previous review standards of subcontracts set forth in Optimum Systems, Incorporated, 54 Comp. Gen. 767 (1975), 75-1 CPD ¶ 166, by eliminating review of subcontracts under any circumstances other than where they are "by or for" a federal agency. Other subcontractor protests are beyond the reach of the Competition In Contracting Act.

Section 21.3(f)(11) has been revised to state more clearly the circumstances in which the GAO will dismiss a

protest involving a matter that is or has been the subject of litigation.

Under section 21.4, some commenters questioned why the provisions of the Competition In Contracting Act relating to withholding of award and suspension of contract performance were included in the Bid Protest Regulations. Several commenters felt the provisions were more appropriate for inclusion in the Federal Acquisition Regulation.

The provisions are contained in section 21.4 for the benefit of protesters so that they will not have to refer to multiple sets of regulations to ascertain the effect of a protest. The citation in sections 21.4(a) and (b) to the Competition in Contracting Act has been moved to the beginning of the sections to make this clear.

GAO received a large number of comments on section 21.7, redesignated section 21.6; most of them concerned the statement in section 21.7(e) that the recovery of the costs of filing and pursuing a protest would be granted only if it is not feasible to recommend any other remedy. Some commenters argued that the granting of the costs of pursuing a protest should be further limited to instances in which the contracting agency's procurement actions and position taken in the protest are not reasonably justified. Conversely, other commenters argued that recovery of costs of pursuing a protest be routinely granted when a protest is

sustained regardless of whether any other remedy is recommended.

After careful consideration of these comments, GAO has decided to modify the provision. Section 21.6(e) has been revised to allow recovery of the costs of pursuing a sustained protest except where GAO recommends that the protested contract be awarded to the protester and the protester receives the award. Also, the section has been revised to include the standard, adopted from language in the Conference Report on the Competition In Contracting Act, that recovery of the costs of pursuing a protest and bid and proposal preparation will be available only where the contracting agency has unreasonably excluded the protester from the procurement. See Conference Report on the Competition In Contracting Act of 1984, H. Rep. No. 98-861, at 1437 (June 23, 1984).

One important purpose of the bid protest forum is to provide a procedure through which private parties may enforce the substantive provisions of the Competition In Contracting Act. GAO believes that the amended regulation will help accomplish this aim without undue expense to the public treasury.

Section 21.12(b), redesignated 21.11(b), has been amended to make clear that sections 3553(c) and (d) of the

Competition In Contracting Act of 1984 relating to withholding of award and suspension of contract performance do not apply to nonstatutory protests.

Section 21.13(c), redesignated 21.12(c), has been reworded, in response to a comment, to also make clear that the filing of a request for reconsideration does not invoke the Competition In Contracting Act provisions for the withholding of award or the suspension of contract performance.

Several commenters have asked that GAO formalize in the regulations its long-standing policy of prohibiting ex parte contacts regarding the merits of a protest between GAO and the parties to a bid protest. GAO will continue to follow this policy and not discuss the merits of a protest with any party except at a protest conference with all parties invited (see section 21.5).

List of subjects in 4 C.F.R. Part 21, Administrative Practice and Procedures, Government Contracts.

Accordingly, 4 C.F.R. Part 21 is revised to read as follows:

PART 21 - BID PROTEST REGULATIONS

Sec.

21.0 Definitions.

21.1 Filing of protest.

21.2 Time for filing.

- 21.3 Notice of protest, submission of agency report and time for filing of comments on report.
- 21.4 Withholding of award and suspension of contract performance.
- 21.5 Conference.
- 21.6 Remedies.
- 21.7 Time for decision by the General Accounting Office.
- 21.8 Express Option.
- 21.9 Effect of judicial proceedings.
- 21.10 Signing and distribution of decisions.
- 21.11 Nonstatutory protests.
- 21.12 Request for reconsideration.

Authority: Sections 3551-3556 of title 31, United States Code.

21.0 Definitions

(a) "Interested party" means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(b) "Federal agency" means any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives and the Architect of

the Capitol and any activities under his direction.

(c) "Contracting agency" means a federal agency which has awarded or proposes to award a contract under a protested procurement.

(d) All "days" referred to are deemed to be "working days" of the federal government except in § 21.4, where the statutory language is repeated. Except as otherwise provided, in computing a period of time prescribed by these regulations, the day from which the designated period of time begins to run shall not be counted, but the last day of the period shall be counted unless that day is not a working day of the federal government, in which event the period shall include the next working day. Time for filing any document or copy thereof with the General Accounting Office expires at 5:30 p.m. Eastern Standard Time or Eastern Daylight Savings Time as applicable on the last day on which such filing may be made.

(e) "Adverse agency action" is any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with the agency. It may include but is not limited to: a decision on the merits of a protest; a procurement action such as the opening of bids or receipt of proposals, the award of a contract, or the rejection of a bid despite the pendency of a protest; or contracting agency acquiescence in and active support of continued and substantial contract performance.

21.1 Filing of Protest

(a) An interested party may protest to the General Accounting Office a solicitation issued by or for a federal agency for the procurement of property or services, or the proposed award or the award of such a contract. After an interested party protests a particular procurement or proposed procurement of automated data processing equipment and services to the General Services Administration Board of Contract Appeals under section III(h) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 759(h)) and while that protest is pending before the Board that procurement or proposed procurement may not be the subject of a protest to the General Accounting Office. An interested party who has filed a protest with the Board may not protest the same matter to the General Accounting Office.

(b) Protests must be in writing and addressed as follows: General Counsel, General Accounting Office, Washington, D.C. 20548, Attention: Procurement Law Control Group.

(c) A protest filed with the General Accounting Office shall:

- (1) include the name, address and telephone number of the protester,
- (2) include an original signed by the

protester or its representative, and
at least one copy,

- (3) identify the issuing agency and the solicitation and/or contract number,
- (4) set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,
- (5) specifically request a ruling by the Comptroller General of the United States (Comptroller General), and
- (6) state the form of relief requested.

(d) The protester shall furnish a copy of the protest (including relevant documents not issued by the contracting agency) to the individual or location designated by the contracting agency in the solicitation for receipt of protests. If there is no designation in the solicitation, the protester shall furnish a copy of the protest to the contracting officer. The designated individual or location, or if applicable, the contracting officer must receive a copy of the protest no later than 1 day after the protest is filed with the General Accounting Office. The protest document must indicate that a copy has been furnished or will be furnished within 1 day to the appropriate individual or location.

(e) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should

be concise, logically arranged, and clearly state legally sufficient grounds of protest.

(f) A protest filed with the General Accounting Office may be dismissed for failure to comply with any of the requirements of this section.

21.2 Time for filing

(a)(1) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation.

(2) In cases other than those covered in paragraph (a)(1) of this section, protests shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

(3) If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered, provided the initial protest to the agency was filed in accordance with

the time limits prescribed in paragraph (a)(1) and (a)(2) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to the General Accounting Office must be filed within the 10-day period provided by this paragraph.

(b) The term "filed" regarding protests to the General Accounting Office means receipt of the protest submission in the General Accounting Office.

(c) The General Accounting Office, for good cause shown, or where it determines that a protest raises issues significant to the procurement system, may consider any protest which is not filed timely.

21.3 Notice of protest, submission of agency report and time for filing of comments on report

(a) The General Accounting Office shall notify the contracting agency by telephone within 1 day of the filing of a protest, and shall promptly mail confirmation of that notification to the contracting agency. The contracting agency shall immediately give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied. The contracting agency shall furnish

copies of the protest submissions to such parties with instructions to communicate further directly with the General Accounting Office. Copies of any such communications from any such parties shall be furnished to the contracting agency.

(b) Material submitted by a protester will not be withheld from any interested party outside the government or from any federal agency which may be involved in the protest except to the extent that the withholding of information is permitted or required by law or regulation. If the protester considers that the protest contains material which should be withheld, a statement advising of this fact must be affixed to the front page of the protest submission and the allegedly protected information must be so identified wherever it appears.

(c) The contracting agency shall file a complete report on the protest with the General Accounting Office within 25 days from the date of the telephone notice of the protest from the General Accounting Office. The report shall contain copies of relevant documents including, as appropriate: the protest, the bid or proposal submitted by the protester, the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested, the solicitation, including the specifications or portions relevant to the protest, the abstract of bids or offers or relevant portions, any other documents that are relevant to

the protest, and the contracting officer's statement setting forth findings, actions, recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall be fully responsive to all allegations of the protest which the agency contests. Pursuant to § 3553(f) of the Competition In Contracting Act of 1984, Pub. L. 98-369, the contracting agency shall simultaneously furnish a copy of the report to the protester and interested parties who have responded to the notice given under paragraph (a) of this section. Copies of reports furnished to such parties shall include relevant documents that would not give the party a competitive advantage and that the party is otherwise authorized by law or regulation to receive. If documents are withheld from any of the parties, the agency must include in the report filed with the General Accounting Office and in the copies of the report provided to the protester and interested parties a list of the withheld documents. The copy of the report filed with the General Accounting Office shall also identify the parties who have been furnished copies of the report.

(d) The contracting agency may request, in writing, an extension of the 25-day report submission time period. The request shall set forth the reasons for which the extension is needed. The General Accounting Office will determine, in writing, whether the specific circumstances of the

protest require a period longer than 25 days for the submission of the report and, if so, will set a new date for the submission of the report. Extensions are to be considered exceptional and will be granted sparingly. The agency should make its request for an extension as promptly as possible to permit it to submit a timely report should the General Accounting Office deny the request.

(e) Comments on the agency report shall be filed with the General Accounting Office within 7 days after receipt of the report, with a copy furnished by the commenting party to the contracting agency and other participating interested parties. Failure of the protester to file comments, or to file a statement requesting that the case be decided on the existing record, or to request an extension under this section within the 7-day period will result in dismissal of the protest. The General Accounting Office upon a showing that the specific circumstances of the protest require a period longer than 7 days for the submission of comments on the agency report, may set a new date for the submission of such comments. Extensions are to be considered exceptional and will be granted sparingly.

(f) Notwithstanding any other provision of this section, when on its face a protest does not state a valid basis for protest or is untimely (unless the protest is to be considered pursuant to § 21.2(c)) or otherwise not for consideration by the General Accounting Office, it

will summarily dismiss the protest without requiring the submission of an agency report. When the propriety of a dismissal becomes clear only after information is provided by the contracting agency or is otherwise obtained by the General Accounting Office, it will dismiss the protest at that time. If the General Accounting Office has dismissed the protest, it will notify the contracting agency that a report need not be submitted. Among the protests which may be dismissed without consideration of the merits are those concerning the following:

(1) Contract Administration. The administration of an existing contract is within the discretion of the contracting agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. § 601-13.

(2) Small Business Size Standards and Standard Industrial Classification. Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification are for review solely by the Small Business Administration. 15 U.S.C. § 637(b)(6); 13 C.F.R. § 121.3-6 (1984).

(3) Small Business Certificate of Competency Program. Any referral made to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act, or any issuance of a certificate of competency or refusal to

issue a certificate under such section is not reviewed by the General Accounting Office absent a showing of possible fraud or bad faith on the part of government officials.

(4) Procurements Under Section 8(a) of the Small Business Act. Since contracts are let under section 8(a) of the Small Business Act to the Small Business Administration at the contracting officer's discretion and on such terms as agreed upon by the procuring agency and the Small Business Administration, the decision to place or not to place a procurement under the 8(a) program and the award of an 8(a) subcontract are not subject to review absent a showing of possible fraud or bad faith on the part of government officials or that regulations may have been violated. 15 U.S.C. § 637(a).

(5) Affirmative Determination of Responsibility by the Contracting Officer. Because a determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed, absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.

(6) Procurement Protested to the General Services Administration Board of Contract Appeals. Interested parties may protest a procurement or proposed procurement of

automated data processing equipment and services to the General Services Administration Board of Contract Appeals. After a particular procurement or proposed procurement is protested to the Board, the procurement may not, while the protest is before the Board, be the subject of a protest to the General Accounting Office. An interested party who has filed a protest with the Board may not protest the same matter to the General Accounting Office. 40 U.S.C. § 759(h), as amended by section 2713 of the Competition In Contracting Act of 1984, Pub. L. 98-369.

(7) Protests not filed either in the General Accounting Office or the contracting agency within the time limits set forth in § 21.2.

(8) Procurements by Agencies Other Than Federal Agencies as Defined by Section 3 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 472. Protests of procurements or proposed procurements by such agencies (e.g., U.S. Postal Service, Federal Deposit Insurance Corporation, nonappropriated fund activities) are beyond the General Accounting Office bid protest jurisdiction as established in section 2741 of the Competition In Contracting Act of 1984, Pub. L. 98-369.

(9) Walsh-Healey Public Contracts Act. Challenges of the legal status of a firm as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act is for determination solely by the procuring agency, the Small Business Administration (if a small business is involved) and the Secretary of Labor. 41 U.S.C. § 35-45.

(10) Subcontractor Protests. The General Accounting Office will not consider subcontractor protests except where the subcontract is by or for the government.

(11) Judicial Proceedings. The General Accounting Office will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction, unless the court requests a decision by the General Accounting Office. The General Accounting Office will not consider protests where the matter involved has been decided on the merits by a court of competent jurisdiction.

(g) A protest decision may not be delayed by the failure of a party to file a submission within the specified time limits. Consequently, the failure of any party or contracting agency to comply with the prescribed time limits may result in resolution of the protest without consideration of the untimely submission.

21.4 Withholding of award and suspension of contract performance

Sections 3553(c) and (d) of the Competition in Contracting Act of 1984, Pub. L. 98-369, set forth the following requirements regarding the withholding of award and suspension of contract performance when a protest is filed with the General Accounting Office. The requirements are included here for informational purposes.

(a) When the contracting agency receives notice of a protest from the General Accounting Office prior to award of a contract it may not award a contract under the protested procurement while the protest is pending unless the head of the procuring activity responsible for award of the contract determines in writing and reports to the General Accounting Office that urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for the General Accounting Office decision. This finding may be made only if the award is otherwise likely to occur within 30 days.

(b) When the contracting agency receives notice of a protest from the General Accounting Office after award of a contract, but within 10 days of the date of contract award, it shall immediately direct the contractor to cease contract performance and to suspend related activities that may result in additional obligations being incurred by the government under that contract while the protest is pending. The head of the procuring activity responsible for award of the contract may authorize contract performance notwithstanding the pending protest if he determines in writing and reports to the General Accounting Office that:

- (1) performance of the contract is in
the government's best interest, or
- (2) urgent and compelling circumstances

significantly affecting interests of the United States will not permit waiting for the General Accounting Office's decision.

21.5 Conference

(a) A conference on the merits of the protest may, at the sole discretion of the General Accounting Office, be held at the request of the protester, interested parties who have responded to the notice given under § 21.3(a), or the contracting agency. Requests for a conference should be made at the earliest possible time in the protest proceeding.

(b) Conferences will be held on a date set by the General Accounting Office no later than 5 days after receipt by the protester and interested parties of the agency report. All such interested parties shall be invited to attend. Ordinarily, only one conference will be held on a bid protest.

(c) If a conference is held, no separate comments under § 21.3(e) will be considered. The protester, all interested parties and the contracting agency may file comments on the conference and report as appropriate with the General Accounting Office, with copies furnished to the other parties, within 5 days of the date on which the conference was held.

(d) The General Accounting Office may request that a conference be held if at any time during the protest proceeding it decides that such a conference is needed to clarify material issues. If such a conference is held, the General Accounting Office shall make such adjustments in the submission deadlines as it determines to be fair to all parties.

(e) Failure of the protester to file comments, or to file a statement requesting that the case be decided on the existing record, or to request an extension under this section within the 5-day period set forth in paragraph (c) of this section will result in dismissal of the protest. The General Accounting Office may set a new date for the submission of comments under the circumstances set forth in § 21.3(e).

21.6 Remedies

(a) If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation, it shall recommend that the contracting agency implement any combination of the following remedies which it deems appropriate under the circumstances:

- (1) refrain from exercising options under the contract;

- (2) terminate the contract;
- (3) recompetete the contract;
- (4) issue a new solicitation;
- (5) award a contract consistent with statute and regulation; or
- (6) such other recommendations as the General Accounting Office determines necessary to promote compliance.

(b) In determining the appropriate recommendation, the General Accounting Office, shall, except as specified in paragraph (c) of this section, consider all the circumstances surrounding the procurement or proposed procurement including, but not limited to, the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, cost to the government, the urgency of the procurement and the impact of the recommendation on the contracting agency's mission.

(c) If the head of the procuring activity makes the finding referred to in § 21.4(b)(1) that performance of the contract notwithstanding a pending protest is in the government's best interest, the General Accounting Office shall make its recommendation under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeteting or reawarding the contract.

(d) If the General Accounting Office determines that a solicitation, proposed award, or award does not comply with statute or regulation it may declare the protester to be entitled to reasonable costs of:

- (1) filing and pursuing the protest,
including attorney's fees; and
- (2) bid and proposal preparation.

(e) The General Accounting Office will allow the recovery of costs under paragraph d(1) of this section where the contracting agency has unreasonably excluded the protester from the procurement except where the General Accounting Office recommends pursuant to paragraph (a)(5) that the contract be awarded to the protester and the protester receives the award. The General Accounting Office will only allow the recovery of costs under paragraph (d)(2) of this section where the contracting agency has unreasonably excluded the protester from the procurement and where other remedies listed in paragraphs (a)(2)-(5) are not appropriate.

(f) If the General Accounting Office decides that the protester is entitled to the recovery of such costs, the protester and the contracting agency shall attempt to reach agreement on the amount of the costs. If the protester and the contracting agency cannot reach agreement within a reasonable time, the General Accounting Office will determine the amount.

21.7 Time for decision by the General Accounting Office

(a) The General Accounting Office shall issue a decision on a protest within 90 days from the date the protest is filed with it.

(b) In those protests for which the General Accounting Office invokes the express option under § 21.8, the General Accounting Office shall issue a decision within 45 calendar days from the date the protest is filed with it.

(c) Under exceptional circumstances the General Accounting Office may extend the deadlines in paragraph (a) of this section on a case-by-case basis by stating in writing the reasons that the specific circumstances of the protest require a longer period.

21.8 Express option

(a) At the request of the protester, the contracting agency or an interested party for an expeditious decision, the General Accounting Office will consider the feasibility of using an express option.

(b) The express option will be invoked solely at the discretion of the General Accounting Office only in those cases suitable for resolution within 45 calendar days.

(c) Requests for the express option must be in writing and received in the General Accounting Office no later than 3 days after the protest is filed. The General Accounting Office will determine within 2 days of receipt of the request whether to invoke the express option and will notify

the contracting agency, protester and interested parties who have responded to the notice under § 21.3(a).

(d) When the express option is used the filing deadlines in § 21.3 and the provisions of § 21.5 shall not apply and:

(1) The contracting agency shall file a complete report with the General Accounting Office on the protest within 10 days from the date it receives notice from the General Accounting Office that the express option will be used and furnish copies of the report to the protester and interested parties who have responded to the notice under § 21.3(a).

(2) Comments on the agency report shall be filed with the General Accounting Office within 5 days after receipt of the report with a copy furnished by the commenting party to the contracting agency and other participating interested parties.

(3) The General Accounting Office may arrange a conference to ascertain and clarify the material issues at any time deemed appropriate during the protest proceeding.

(4) The General Accounting Office shall issue its decision within 45 calendar days from the date the protest is filed with it.

21.9 Effect of judicial proceedings

(a) The General Accounting Office will dismiss any protest where the matter involved is the subject of

litigation before a court of competent jurisdiction, unless the court requests a decision by the General Accounting Office. The General Accounting Office will dismiss any protest where the matter involved has been decided on the merits by a court of competent jurisdiction.

(b) Where the court requests a decision by the General Accounting Office, the times for filing the agency report (§ 21.3(c)), filing comments on the report (§ 21.3(e)), holding a conference and filing comments (§ 21.5), and issuing a decision (§ 21.7) may be changed if the court so orders.

21.10 Signing and distribution of decisions

Each bid protest decision shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to all participating interested parties, the protester, the head of the contracting activity responsible for the protested procurement, the senior procurement executive of each federal agency involved, and any member of the public.

21.11 Nonstatutory protests

(a) The General Accounting Office may consider protests concerning sales by a federal agency or procurements by agencies of the government other than federal agencies as defined in § 21.0(b) or by the District of Columbia, if the agency involved has agreed in writing to have its protests decided by the General Accounting Office.

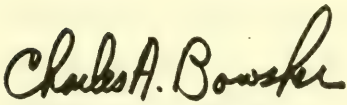
(b) All of the provisions of these Bid Protest Regulations shall apply to any nonstatutory protest decided by the General Accounting Office except for the provisions of § 21.6(d) pertaining to entitlement to reasonable costs of filing and pursuing the protest, including attorney's fees. Sections 3553(c) and (d) of the Competition in Contracting Act of 1984, Pub. L. 98-369, pertaining to withholding of award and suspension of contract performance shall not apply.

21.12 Request for reconsideration

(a) Reconsideration of a decision of the General Accounting Office may be requested by the protester, any interested party who participated in the protest, and any federal agency involved in the protest. The General Accounting Office will not consider any request for reconsideration which does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) Request for reconsideration of a decision of the General Accounting Office shall be filed, with copies to any federal agency and interested parties who participated in the protest, not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the General Accounting Office.

(c) A request for reconsideration shall be subject to those bid protest procedures consistent with the need for prompt and fair resolution of the matter. The filing of a request for reconsideration will not invoke § 3553(c) or (d) of the Competition in Contracting Act of 1984, Pub. L. 98-369 relating to the withholding of award and the suspension of contract performance.

A handwritten signature in dark ink, reading "Charles A. Bowsher". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Charles A. Bowsher
Comptroller General
of the United States

Attachment II

Billing Code 1610-10

Title 4 - Accounts

CHAPTER I - GENERAL ACCOUNTING OFFICE

Part 21 - GENERAL ACCOUNTING OFFICE - BID PROTEST
REGULATIONS

AGENCY: General Accounting Office

ACTION: Proposed rule.

SUMMARY: This amendment to Part 21 of title 4, Code of Federal Regulations implements sections 3551-3556 of title 31, United States Code (as added by section 2741 of the Competition in Contracting Act of 1984 (Pub. L. 98-369)) and establishes regulations for the consideration of bid protests by the General Accounting Office.

The proposed regulations are designed to insure compliance by both the General Accounting Office and the Federal agencies with the statutory time limits for the issuance of bid protest decisions. The proposed regulations follow the statutorily mandated time limits for reports by federal agencies and General Accounting Office decisions and also provide for the withholding of awards or the suspension of performance of contracts once a protest is filed.

DATES: The GAO will consider comments received on or before October 17, 1984.

ADDRESS: Send comments to U.S. General Accounting Office, Office of General Counsel, 441 G Street, N.W., Washington, D.C. 20548.

FOR FURTHER INFORMATION CONTACT: James W. Vickers, Senior Attorney, General Accounting Office, by telephone (202) 275-6181.

SUPPLEMENTARY INFORMATION: The Competition In Contracting Act of 1984, Pub. L. 98-369, (the Act) provides for a procurement protest system whereby interested parties may protest to the Comptroller General alleged violations of a procurement statute or regulation with respect to a procurement or proposed procurement by a federal agency.

The major changes or additions to the current General Accounting Office Bid Protest Procedures (4 C.F.R. part 21 (1984)) are discussed in the following section analysis.

Section 21.0 contains the definitions of "interested party" and "federal agency" from section 3551 of the Act in addition to definitions of "contracting agency" and "contracting activity." The definitions of "working days" and "adverse agency action" are the same as in the current procedures.

Section 21.1 includes the definition of "protest" in section 3551 of the Act and provides in accordance with section 3552 of the Act that GAO will not decide protests filed initially with the General Services Administration Board of Contract Appeals. This section also sets forth the necessary elements of a protest including the requirement for a certificate of service showing that a copy of the protest has been served on the contracting agency.

Section 21.2 follows the basic timeliness rules of the current procedures and also contains strict procedural requirements for filing a protest.

Section 21.3 follows the current procedures with the addition of a 25-day deadline for filing the agency report, the procedure for extending the deadline and a description of what the report must contain. The time for comments on the report by the protester has been shortened to 7 days from the 10 days permitted under the current procedures. This section also lists examples of the type of cases which will be dismissed as not under GAO's jurisdiction and provides for summary dismissals. Finally, this section implements the provision of section 3555 of the Act that the failure of any party to comply with the stated time limits may result in the matter being decided without consideration of the late submission.

Section 21.4 implements sections 3553(c)(1) and (d)(1) of the Act regarding withholding of award and suspension of contract performance following the filing of a protest.

Section 21.5 permits interested parties to request relevant documents from the agency as required by section 3553(f) of the Act.

Section 21.6 maintains our current bid protest conference mechanism but shortens the time limits and comment procedures reflecting the limited time under the Act to issue decisions.

Section 21.7 provides for the remedies set forth in section 3554(b)(1) of the Act and states that we will declare a successful protester to be entitled to costs only if the section 3554(b)(1) remedies are not feasible.

Section 21.8 sets forth the statutory deadlines for issuing decisions under normal and express option procedures and provides for extension of the 90-day period as permitted by section 3554(a)(1) of the Act.

Section 21.9 establishes the express option procedure required by section 3554(a)(2) of the Act and incorporates the 10-day deadline for agency reports in section 3553(b)(2)(c) of the Act. Streamlined procedures for hearing these protests are set forth.

Section 21.10 is similar to our current procedures except that a court must specifically request a decision and further provides for change of all deadlines if a court so orders.

Section 21.11 follows section 3554(d) of the Act.

Section 21.12 provides that GAO will continue to decide certain protest matters which it has traditionally considered, namely, protests of sales by federal agencies, and of procurements by the District of Columbia and by agencies of the government other than federal agencies, if they agree. GAO's protest function has for over 60 years proved to be a useful and beneficial dimension in the procurement/sales practices of the government. This section provides for a continuation of those benefits in situations

where GAO's experience indicates they may be needed, but it omits particular features of section 2741(a) of the Competition in Contracting Act of 1984 which have not by that law been made applicable to these protests.

Section 21.13 follows our current procedures regarding requests for reconsideration.

List of Subjects is 4 CFR Part 21

Administrative practice and procedure, Government contracts.

part 21 - Bid Protest Regulations

Sec.

21.0 Definitions.

21.1 Filing of protest.

21.2 Time for filing.

21.3 Notice of protest, submission of agency report and time for filing comments on report.

21.4 Withholding of award and suspension of contract performance.

21.5 Furnishing of protest-related information by contracting agencies.

21.6 Conferences.

21.7 Remedies.

21.8 Time for decision by the General Accounting Office.

21.9 Express Option.

21.10 Effect of judicial proceedings.

21.11 Signing and distribution of decisions.

21.12 Nonstatutory protests.

21.13 Request for reconsideration.

Authority: Sections 3551-3556 of title 31, United States Code.

21.0 Definitions

(a) "Interested party" means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

(b) "Federal agency" means any executive department or independent establishment in the executive branch, including any wholly owned government corporation, and any establishment in the legislative or judicial branch, except the Senate, the House of Representatives and the Architect of the Capitol and any activities under his direction.

(c) "Contracting agency" means a federal agency which has awarded or proposes to award a contract under a protested procurement.

(d) "Contracting activity" means that part of a contracting agency directly responsible for the award or proposed award of a contract under a protested procurement.

(e) All "days" referred to are deemed to be "working days" of the federal government unless otherwise designated.

(f) "Adverse agency action" is any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with the agency. It may include but is not limited to: a decision on the merits of a protest; a procurement action such as the award

of a contract or the rejection of a bid despite the pendency of a protest; or contracting agency acquiescence in and active support of continued and substantial contract performance.

21.1 Filing of Protest

(a) An interested party may protest to the General Accounting Office a solicitation issued by or for a federal agency for the procurement of property or services, or the proposed award or the award of such a contract. A party who has filed a protest with the General Services Administration Board of Contract Appeals under section III(h) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 759(h)) with respect to a procurement or proposed procurement of automated data processing equipment and services may not file a protest with respect to that procurement with the General Accounting Office.

(b) Protests must be in writing and addressed as follows: General Counsel, General Accounting Office, Washington, D.C. 20548, Attention: Procurement Law Control Group.

c) A protest filed with the General Accounting Office shall:

- (1) include the name, address and telephone number of the protester,
- (2) be signed by the protester or its representative,

- (3) identify the contracting activity and the solicitation and/or contract number,
- (4) set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,
- (5) specifically request a ruling by the Comptroller General of the United States (Comptroller General) and
- (6) state the form of relief requested.

A copy of the protest (including relevant documents not issued by the contracting agency) shall be concurrently served upon the contracting agency and the contracting activity. The protest submissions filed with the General Accounting Office shall be accompanied by a certificate of such service.

(d) No formal briefs or other technical forms of pleading or motion are required. Protest submissions should be concise, logically arranged, and clearly state legally sufficient grounds of protest.

(e) A protest filed with the General Accounting Office may be dismissed for failure to comply with any of the requirements of this section.

21.2 Time for filing

(a)(1) Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt

of initial proposals. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation.

(2) In cases other than those covered in paragraph (a)(1) of this section, protests shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier.

(3) If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered, provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (a)(1) and (a)(2) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In cases where an alleged impropriety in a solicitation is timely protested to a contracting agency, any subsequent protest to the General Accounting Office must be filed within the 10-day period provided by this paragraph.

(b)(1) The term "filed" regarding protests to the General Accounting Office means receipt of the protest submission in the Procurement Law Control Group of the General

Accounting Office. A protest will not be considered filed unless it includes evidence of service upon the contracting agency and the contracting activity in accordance with paragraph (b)(2) of this section. The term "filed" regarding protests to the contracting agency means receipt in the contracting agency.

(2) Service upon the contracting agency and the contracting activity shall be made by delivering in person or by commercial mail carrier the protest submission to both locations or by depositing the protest submission properly addressed with postage prepaid, in the United States mail (certified, first class, or overnight mail only). Service upon a party is accomplished in the same manner.

(3) The original of the protest submission required to be served shall contain a certificate of service signed by the protester or its representative stating that service has been made, the date and manner of service.

(d) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to the procurement system, may consider any protest which is not filed timely.

21.3 Notice of protest, submission of agency report and time for filing of comments on report

(a) The General Accounting Office shall notify the contracting agency within 1 day of the filing of a protest. The contracting agency shall immediately give notice of the

protest to the contractor if award has been made or, if no award has been made, to all bidders or offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied. The contracting agency shall furnish copies of the protest submissions to such parties with instructions to communicate further directly with the General Accounting Office. Copies of any such communications shall be furnished to the contracting agency.

(b) Material submitted by a protester will not be withheld from any interested party outside the government or from any federal agency which may be involved in the protest except to the extent that the withholding of information is permitted or required by law or regulation. If the protester considers that the protest contains material which should be withheld, a statement advising of this fact must be affixed to the front page of the protest submission and the allegedly protected information must be so identified wherever it appears.

(c) The contracting agency shall file a complete report on the protest with the General Accounting Office within 25 days from the date of receipt of notice of the protest from the General Accounting Office. The contracting agency shall simultaneously serve the report upon the protester and interested parties who have responded to the notice given under paragraph (a) of this section. The report shall contain copies of: the protest, the bid or proposal

submitted by the protester and of the bid or proposal of the firm which is being considered for award, or whose bid or proposal is being protested, the solicitation, including the specifications or portions relevant to the protest, the abstract of bids or offers or relevant portions, any other documents that are relevant to the protest, and the contracting officer's statement setting forth findings, actions, recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall be fully responsive to all allegations of the protest which the agency contests. The copy of the report filed with the General Accounting Office shall also include a certificate of service signed by an agency representative stating that service has been made, the date and manner of service. Service upon the protester and interested parties shall be made in the same manner as service upon the contracting agency and contracting activity provided for in § 21.2(b)(2).

(d) The contracting agency may request, in writing, an extension of the 25-day report submission time period. The request shall set forth the reasons for which the extension is needed. The Comptroller General will determine, in writing, whether the specific circumstances of the protest require a period longer than 25 days for the submission of the report and, if so, will set a new date for the submission of the report. Extensions are to be considered exceptional and will be granted sparingly. The

agency should make its request for an extension as promptly as possible to permit it to timely submit a report should the Comptroller General deny the request.

(e) Comments on the agency report shall be filed with the General Accounting Office within 7 days after receipt of the report, with a copy served on the contracting agency and other participating interested parties. Failure of the protester to file comments, or to file a statement that it does not intend to file comments but desires a decision on the basis of the existing record, or to request an extension under this section within the 7-day period will result in dismissal of the protest. The Comptroller General upon a showing that the specific circumstances of the protest require a period longer than 7 days for the submission of comments on the agency report, may set a new date for the submission of such comments. Extensions are to be considered exceptional and will be granted sparingly.

(f) Notwithstanding any other provision of this section, when on its face a protest does not state a valid basis for protest or is untimely (unless the protest is to be considered pursuant to § 21.2(d)) the Comptroller General will summarily dismiss the protest without requiring the submission of an agency report. When the propriety of a dismissal becomes clear only after information is provided by the contracting agency or is otherwise obtained by the General Accounting Office, the Comptroller General shall dismiss the protest at that time. If the Comptroller

General has dismissed the protest, he will notify the contracting agency that a report need not be submitted. Among the protests which may be dismissed without consideration of the merits are those concerning the following:

(1) Contract Administration. The administration of an existing contract is within the discretion of the contracting agency. Disputes between a contractor and the agency are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978. 41 U.S.C. § 601-13.

(2) Small Business Size Standards. Challenges of established size standards or the size status of particular firms are for review solely by the Small Business Administration. 15 U.S.C. § 637(b)(6).

(3) Negative Determination of Responsibility of a Small Business Concern. The Small Business Administration, under its certificate of competency program, makes final dispositions of contracting officer determinations that a small business firm is not responsible to perform a contract. 15 U.S.C. § 637(b)(7)(A).

(4) Set-Asides and Awards Under Section 8(a) of the Small Business Act. Since contracts are let under section 8(a) of the Small Business Act to the Small Business Administration at the contracting officer's discretion and on such terms as agreed upon by the procuring agency and the Small Business Administration, the decision to effect a

procurement under the 8(a) program and the award of an 8(a) subcontract are not subject to review absent a showing of possible fraud or bad faith or that regulations were violated. 15 U.S.C. § 637(a).

(5) Affirmative Determination of Responsibility. Because a determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed, absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.

(6) Procurement Protested to the General Services Administration Board of Contract Appeals. Interested parties may protest a procurement or proposed procurement of automated data processing equipment and services to the General Services Administration Board of Contract Appeals. Once a particular procurement or proposed procurement is protested to the Board, the matter may not be the subject of a protest to the General Accounting Office. 40 U.S.C. § 759(h), as amended by section 2713 of the Competition In Contracting Act of 1984, Pub. L. 98-369.

(7) Protests not filed either in the General Accounting Office or the contracting agency within the time limits set forth in § 21.2.

(8) Procurements by agencies other than federal agencies as Defined by Section 3 of the Federal Property and Administration Services Act of 1979, 40 U.S.C. § 472. Protest of procurements or proposed procurements by such agencies (e.g., U.S. Postal Service, Federal Deposit Insurance Corporation) are beyond the General Accounting Office bid protest jurisdiction as established in section 2741 of the Competition In Contracting Act of 1984, Pub. L. 98-369.

(9) Nonappropriated Fund Activities. The General Accounting Office has no authority under section 2741 of the Competition In Contracting Act of 1984, Pub. L. 98-369 to consider protests that do not involve the expenditure of appropriated funds.

(10) Walsh-Healey Public Contracts Act. Challenges of the legal status of a firm as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act is for determination solely by the procuring agency, the Small Business Administration (if a small business is involved) and the Secretary of Labor. 41 U.S.C. § 35-45.

(11) Judicial Proceedings. The General Accounting Office will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction or has been decided on the merits by such a court, unless the court requests a decision by the General Accounting Office.

(g) A protest decision may not be delayed by the failure of a party to file a submission within the specified time limits. Consequently, the failure of any party or contracting agency to comply with the prescribed time limits may result in resolution of the protest without consideration of the untimely submission.

21.4 Withholding of award and suspension of contract performance

(a) When the contracting agency receives notice of a protest from the General Accounting Office prior to award of a contract it may not award a contract, including an order under a Federal Supply Schedule contract or a basic ordering agreement, under the protested procurement while the protest is pending unless the head of the procuring activity responsible for award of the contract determines in writing and reports to the General Accounting Office that urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for the General Accounting Office decision. This finding may be made only if the award is otherwise likely to occur within 30 calendar days. See section 3553(c) of the Competition In Contracting Act of 1984, Pub. L. 98-369.

(b) When the contracting agency receives notice of a protest from the General Accounting Office after award of a contract, but within 10 days of the date of contract award, it shall immediately direct the contractor to cease contract performance and to suspend related activities that may

result in additional obligations being incurred by the government under that contract while the protest is pending. The head of the procuring activity responsible for award of the contract may authorize contract performance notwithstanding the pending protest if he determines in writing and reports to the General Accounting Office that :

(1) performance of the contract is in the government's best interest, or

(2) urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for the General Accounting Office's decision. See section 3553(d) of the Competition In Contracting Act of 1984, Pub. L. 98-369.

21.5 Furnishing of protest-related information by contracting agencies.

Upon request by an interested party the contracting agency shall provide, to that party, within 5 days of receipt of the request, any document relevant to the protested procurement (including the report required by § 21.3(c)) that the party is entitled by law or regulation to receive.

21.6 Conference

(a) A conference on the merits of the protest may, at the sole discretion of the General Accounting, be held at the request of the protester, interested parties who have responded to the notice given under § 21.3(a), or the contracting agency. Requests for a conference should be

made at the earliest possible time in the protest proceeding.

(b) Conferences will be held on a date set by the General Accounting Office no later than 5 days after receipt by the protester and interested parties of the agency report. All such interested parties shall be invited to attend. Ordinarily, only one conference will be held on a bid protest.

(c) If a conference is held, no separate comments under § 21.3(e) will be considered. The protester, all interested parties and the contracting agency shall file comments on the conference and report as appropriate with the General Accounting Office, with service on the other parties, within 5 days of the date on which the conference was held.

(d) The General Accounting Office may request that a conference be held if at any time during the protest proceeding it decides that such a conference is needed to clarify material issues. If such a conference is held, the General Accounting Office shall make such adjustments in the submission deadlines as it determines to be fair to all parties.

(e) Failure of the protester to file comments, or to file a statement that it does not intend to file comments but desires a decision on the basis of the existing record, or to request an extension under this section within the 5-day period set forth in paragraph (c) of this section will result in dismissal of the protest. The General

Accounting Office may set a new date for the submission of comments under the circumstances set forth in § 21.3(e).

21.7 Remedies

(a) If the Comptroller General determines that a solicitation, proposed award, or award does not comply with statute or regulation, the Comptroller General shall recommend that the contracting agency implement any combination of the following remedies which the Comptroller General deems appropriate under the circumstances:

(1) refrain from exercising options under the contract;

(2) terminate the contract;

(3) recompetete the contract;

(4) issue a new solicitation;

(5) award a contract consistent with statute and regulation; or

(6) such other recommendations as the Comptroller General determines necessary to promote compliance.

(b) In determining the appropriate recommendation, the Comptroller General, shall, except as specified in paragraph

(c) of this section, consider all the circumstances surrounding the procurement or proposed procurement including, but not limited to, the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the competitive procurement system, the good faith of the parties, the

extent of performance, cost to the government, the urgency of the procurement and the impact of the recommendation on the contracting agency's mission.

(c) If the head of the procuring activity makes the finding referred to in § 21.4(b)(1) that performance of the contract notwithstanding a pending protest is in the government's best interest, the Comptroller General shall make its recommendation under paragraph (a) of this section without regard to any cost or disruption from terminating, recompeting or reawarding the contract.

(d) If the Comptroller General determines that a solicitation, proposed award, or award does not comply with statute or regulation it may declare the protester to be entitled to the costs of:

- (1) filing and pursuing the protest,
including reasonable attorney's
fees; and
- (2) bid and proposal preparation.

(e) Ordinarily, the Comptroller General will allow the recovery of costs under paragraph (d) of this section only if it is not feasible to recommend any of the remedies listed in paragraphs (a)(2)-(5) of this section.

(f) If the Comptroller General decides that the protester is entitled to the recovery of such costs, the protester and the contracting agency shall attempt to reach agreement on the amount of the costs. If the protester and the contracting agency cannot reach agreement within a

reasonable time, the Comptroller General will determine the amount.

21.8 Time for decision by the General Accounting Office

(a) The General Accounting Office shall issue a decision on a protest within 90 days from the date the protest is filed with it.

(b) In those protests for which the General Accounting Office invokes the express option under § 21.11, the General Accounting Office shall issue a decision within 45 calendar days from the date the protest is filed with it.

(c) The General Accounting Office may extend the deadlines in paragraph (a) of this section on a case-by-case basis by stating in writing the reasons that the specific circumstances of the protest require a longer period. Such extensions are regarded as exceptional, and are to be used in unique circumstances only.

21.9 Express option

(a) At the request of the protester, the contracting agency or an interested party for an expeditious decision, the Comptroller General will consider the feasibility of using an express option.

(b) The express option will be invoked solely at the discretion of the Comptroller General only in those cases suitable for resolution within 45 calendar days.

(c) Requests for the express option must be in writing and received in the General Accounting Office no later than 3 days after the protest is filed. The Comptroller General will determine within 2 days of receipt of the request whether to invoke the express option and will notify the contracting agency, protester and interested parties who have responded to the notice under § 21.3(a).

(d) When the express option is used the filing deadlines in § 21.3 and the provisions of § 21.6 shall not apply and:

(1) The contracting agency shall file a complete report with the Procurement Law Control Group of the General Accounting Office on the protest within 10 days from the date it receives notice from the General Accounting Office that the express option will be used, with service upon the protester and interested parties who have responded to the notice under § 21.3(a).

(2) Comments on the agency report shall be filed with the General Accounting Office within 5 days after receipt of the report with a copy served on the contracting agency and other participating interested parties.

(3) The General Accounting Office may arrange a conference to ascertain and clarify the material issues at any time deemed appropriate during the protest proceeding.

(4) The General Accounting Office shall issue its decision within 45 calendar days from the date the protest is filed with it.

21.10 Effect of judicial proceedings

(a) The Comptroller General will dismiss any protest where the matter involved is the subject of litigation before a court of competent jurisdiction or has been decided on the merits by such a court.

(b) Paragraph (a) of this section shall not apply where the court requests a decision by the General Accounting Office.

(c) Where the court requests a decision by the General Accounting Office, the times for filing the agency report (§21.3(c)), filing comments on the report (§ 21.3(e)), holding a conference and filing comments (§ 21.6), and issuing a decision (§ 21.8) may be changed if the court so orders.

21.11 Signing and distribution of decisions

Each bid protest decision shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to all participating interested parties, the protester, the head of the contracting activity responsible for the protested procurement, the senior procurement executive of each federal agency involved, and any member of the public.

21.12 Nonstatutory protests

(a) The General Accounting Office may consider protests concerning sales by a federal agency or procurements by agencies of the government other than federal agencies as defined in § 21.0(b) or by the District of Columbia, if they

agree to have their protests decided by the General Accounting Office.

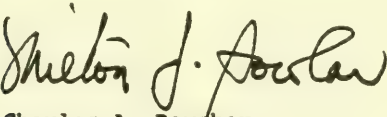
(b) All of the provisions of these Bid Protest Regulations shall apply to any nonstatutory protest decided by the Comptroller General, except for the provisions of section 21.4 pertaining to withholding of award and suspension of contract performance, and except for the provision of section 21.7(d) pertaining to entitlement to attorney's fees.

21.13 Request for reconsideration

(a) Reconsideration of a decision of the General Accounting Office may be requested by the protester, any interested party who participated in the protest, and any federal agency involved in the protest. The General Accounting Office will not consider any request for reconsideration which does not contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered which was not available to the party during the pendency of the protest.

(b) Request for reconsideration of a decision of the General Accounting Office shall be filed, with copies to any federal agency and interested parties who participated in the protest, not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the General Accounting Office.

(c) A request for reconsideration shall be subject to those bid protest procedures consistent with the need for prompt and fair resolution of the matter.

for 

Charles A. Bowsner
Comptroller General
of the United States

Rules and Regulations

Federal Register

Vol. 48, No. 11

Monday, January 17, 1983

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each month.

GENERAL ACCOUNTING OFFICE

4 CFR Part 21.

Bid Protest Procedures

AGENCY: General Accounting Office.
ACTION: Final rule.

SUMMARY: This amendment to Part 21 of title 4, Code of Federal Regulations, will formally establish an express option procedure to expedite the development and resolution of bid protests where deemed appropriate by the General Accounting Office. Experience gained under the current Procedures indicates that some bid protests can be handled more effectively if accelerated procedures are used. This amendment also will formalize the existing practices of (1) requiring a protester to comment on an agency report or otherwise express interest in a General Accounting Office decision, within 10 days of the protester's receipt of the report, and (2) summarily denying or dismissing protests in appropriate cases. This amendment also will eliminate an ambiguity concerning the requirement for filing a protest timely. This amendment will increase the effectiveness of the bid protest process.

EFFECTIVE DATE: February 16, 1983.

FOR FURTHER INFORMATION CONTACT: John M. Melody, U.S. General Accounting Office, Office of General Counsel, Room 7074A, 441 G Street NW., Washington, D. C. 20548, (202) 275-5478.

SUPPLEMENTARY INFORMATION: The General Accounting Office has established detailed procedures for the consideration of bid protests at 4 CFR Part 21. These revisions are designed to afford interested parties to protests an opportunity to comment on the matter while at the same time assuring that protests will be resolved more quickly and effectively through accelerated

procedures. The express option under new § 21.11 explicitly provides for such accelerated procedures. The revision to § 21.2 clarifies application of the timeliness requirement for filing protests regarding solicitation improprieties, in accordance with the decision reported at 58 Comp. Gen. 750 (1979), 79-2 CPD 159.

The express option will be invoked only when deemed appropriate by the General Accounting Office. Generally, the express option will be appropriate where, in the view of the General Accounting Office, the protest can be effectively resolved only if the protest record is developed more quickly than in the time provided under the current procedures. Where the General Accounting Office invokes the express option it will arrange conferences or conference calls with the parties to pinpoint vital issues and to establish mutually agreeable deadlines for the filing of submissions, including the agency's administrative report and any comments by the protester and interested parties.

The General Accounting Office currently requires protesters to file comments on the agency's report or otherwise express interest in a protest decision within 10 days of receiving the report, for the purpose of compelling protesters to decide in a timely manner whether or not to continue their protests. If there were no such time constraint and protesters were able to express continuing interest at any time, the subject procurement often would be unnecessarily disrupted. Incorporating this requirement in the Procedures under § 21.3(d) will make protesters fully aware of their responsibilities in pursuing a protest. Protests are denied summarily or dismissed wherever it is clear on the face of the protest that it is without merit or concerns a matter not appropriate for review by the General Accounting Office. The examples set forth in new § 21.3(g) are intended to aid potential protesters in determining in advance whether the General Accounting Office is the appropriate forum for their complaint.

Section 21.2 (a) provides that a protest filed with the General Accounting Office after a timely protest has been filed initially with the contracting agency will be considered only if filed with the General Accounting Office within 10 days of the protester's learning of

adverse agency action on the protest lodged with the agency. Section 21.2(b)(1) provides that the General Accounting Office will consider a protest alleging an impropriety in a solicitation apparent prior to bid opening or the closing date for receipt of proposals if the protest is filed prior to the bid opening or closing time. In cases where a protester learns of adverse agency action on such a protest more than 10 days prior to the bid opening or closing date, the General Accounting Office intends the rule of § 21.2(a) to apply. The addition to § 21.2 is to make clear that § 21.2(a) applies.

List of Subjects is 4 CFR Part 21

Administrative practice and procedures, Government contracts.

PART 21—(AMENDED)

Accordingly, 4 CFR Part 21 is amended as follows:

1. The authority citation for Part 21 reads as follows:

Authority: Sec. 311, 42 Stat. 25, as amended (31 U.S.C. 52); Interpret or apply sec. 305, 42 Stat. 24 (31 U.S.C. 71); sec. 304, 42 Stat. 24, as amended (31 U.S.C. 74).

2. The table of contents for Part 21 is amended as follows:

Sec.

21.3 Notice of protest, submission of agency report and requirement for filing response to report.

21.11 Express option.

3. The last sentence of paragraph (a) of § 21.2 is revised to read as follows:

§ 21.2 Time for filing.

(a) * * * In any case, a protest will be considered if filed initially with the General Accounting Office within the time limits prescribed in paragraph (b).

4. Add a new sentence at the end of existing paragraph (b)(1) of § 21.2 as follows:

(b) (1) * * * In cases where an alleged impropriety in a solicitation is timely protested to an agency as provided for in paragraph (a), any subsequent protest to the General Accounting Office must be filed within the 10-day period provided by paragraph (a).

8. Section 21.3 is amended by revising the heading to read as follows:

§ 21.3 Notice of protest, submission of agency report and requirement for filing response to report.

6. Revise paragraph (d) of § 21.3 to read as follows:

(d) Comments on the agency report, or a statement that the protester does not intend to file comments but desires a decision on the basis of the existing record, shall be filed with the Office of General Counsel within 10 days after receipt of the report, with a copy to the agency office which furnished the report and to other interested parties. The failure of a protester to either file comments or otherwise indicate within the 10-day period any interest in receiving a decision shall result in dismissal of the protest.

7. Paragraph (e) of § 21.3 is redesignated paragraph (f) and a new paragraph (e) is added to read as follows:

(e) Any rebuttal to comments on the agency report a protester or interested parties may care to make shall be filed with the Office of General Counsel, General Accounting Office, within 5 days after receipt of the comments to which rebuttal is directed, with a copy to the agency office which furnished the report, the protester and interested parties, as the case may be. Unsolicited agency rebuttals shall be considered if filed within 5 days after receipt of the comments to which rebuttal is directed.

8. A new paragraph (g) is added to § 21.3 reading as follows:

(g) Notwithstanding any other provision of this § 21.3, when on its face a protest is clearly without legal merit or is not reviewable by the General Accounting Office under these Procedures, the protest shall be summarily denied or dismissed without a report from the agency. When the propriety of dismissal becomes clear only after information is provided by the agency or is otherwise obtained by the Office of General Counsel, the protest shall be dismissed at that time. Among the protests which may be dismissed without consideration of the merits of the protests are those concerning the following:

(1) *Contract Administration.* The administration of an on-going contract is within the discretion of the contracting agency. Disputes between a contractor and the agency are resolved pursuant to

the disputes clause of the contract and the Contract Disputes Act of 1978, 41 U.S.C. 601-13 (Supp. IV 1980).

(2) *Small Business Size Standards.* Challenges of established size standards or the size status of particular firms are for review solely by the Small Business Administration, 15 U.S.C. 637(b)(3).

(3) *Negative Determination of Responsibility of a Small Business Concern.* The Small Business Administration, under its certificate of competency program, makes final dispositions of contracting officer determinations that a small business firm is not responsible to perform a contract, 15 U.S.C. 637(b)(7)(A) (Supp. IV 1980).

(4) *Affirmative Determination of Responsibility.* Because a determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing that such determination was made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met.

(5) *Procurements or Sales by Agencies Whose Accounts Are Not Subject to Settlement by the General Accounting Office.* Protests of procurements by such agencies (e.g., U.S. Postal Service, Federal Deposit Insurance Corporation, nonappropriated fund activities) are beyond the Office's bid protest jurisdiction, which is based on the statutory authority to adjust and settle accounts, 31 U.S.C. 3528, 96 Stat. 877 (formerly 31 U.S.C. 71, 74).

9. A new § 21.11 is added, reading as follows:

§ 21.11 Express option.

At the request of the protester, the procuring agency, an interested party, or a court (pursuant to § 21.10 of these Procedures), for an expeditious decision, the Office of General Counsel will consider the feasibility of using an express option. The express option will be invoked solely at the discretion of the Office of General Counsel. Generally, use of the express option will be regarded as appropriate where the protest can be effectively resolved only if the protest record is developed more quickly than in the time provided in § 21.3. When the express option is used, the Office of General Counsel will arrange a preliminary conference (or conference call) to ascertain and clarify the material issues, to establish a realistic accelerated timetable for all protest submissions, to assist the parties in exchanging material documents, to

set a date for the informal conference, and to set a date as the goal for issuance of the decision.

Charles A. Bowsher,
Comptroller General of the United States.

78 Dec. 83-1116 Filed 1-16-83; 8:48 am
BILLING CODE 1010-01-01

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 913, 928, 932, 959, 971, and 979

Expenses and Rates of Assessment for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation authorizes expenses of the committees functioning under Marketing Orders 913, 928, 959, 971, and 979 and amends the expenses of Marketing Order 932. Funds to administer these programs are derived from assessments on handlers of the fruits and vegetables regulated under the orders.

EFFECTIVE DATES: August 1, 1982-July 31, 1983 (§ 913.217, § 959.222, § 971.221); October 1, 1982-September 30, 1983 (§ 979.204); January 1-December 31, 1983 (§ 928.211); and September 1, 1982-December 31, 1983 (§ 932.217).

FOR FURTHER INFORMATION CONTACT: Charles W. Porter, Chief, Vegetable Branch, F&V, AMS, USDA, Washington, D.C. 20250; (202) 447-2615.

SUPPLEMENTARY INFORMATION: This rule has been reviewed under Secretary's Memorandum 1512-1 and Executive Order 12291 and has been designated a "non major" rule. William T. Manley, Deputy Administrator, Agricultural Marketing Service, has determined that this action will not have a significant economic impact on a substantial number of small entities because it would not significantly affect costs for the directly regulated handlers.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon the recommendations and information submitted by each committee established under the respective marketing order, and upon other information. It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.

It is further found that it is impracticable and contrary to the public

rules and regulations

PART 21—BID PROTEST PROCEDURES

- 21.0 Definitions.
- 21.1 Filing of protest.
- 21.2 Time for filing.
- 21.3 Notice of protest, submission of agency report and time for filing of comments on report.
- 21.4 Withholding of award.
- 21.5 Furnishing of information on protests.
- 21.6 Time for submission of additional information.
- 21.7 Conference.
- 21.8 Time for decision by Comptroller General.
- 21.9 Request for reconsideration.
- 21.10 Effect of judicial proceedings.

AUTHORITY: Sec. 311, 42 Stat. 25, as amended (31 U.S.C. 52). Interpret or apply sec. 305, 42 Stat. 24 (31 U.S.C. 71); sec. 304, 42 Stat. 24, as amended (31 U.S.C. 74).

SOURCE: 40 FR 17979, Apr. 24, 1975, unless otherwise noted. Redesignated at 45 FR 68374, Oct. 15, 1980.

§ 21.0 Definitions.

(a) All "days" referred to in this part are deemed to be "working days" of the Federal Government. The term "file" or "submit" in all sections except § 21.2 and § 21.9(b) refers to the date of transmission.

(b) "Adverse agency action" is any action or inaction on the part of a contracting agency which is prejudicial to the position taken in a protest filed with an agency. It may include but is not limited to: A decision on the merits of the protest; a procurement action such as the award of a contract or the rejection of a bid despite the pendency of a protest; or contracting agency acquiescence in and active support of continued and substantial contract performance.

§ 21.1 Filing of protest.

(a) An interested party may protest to the General Accounting Office the award or the proposed award of a formally advertised or negotiated contract of procurement or sale by or for an agency of the Federal Government whose accounts are subject to settlement by the General Accounting Office.

(b) Such protests must be in writing and addressed to the General Counsel, General Accounting Office, Washington, D.C. 20548. To expedite handling within the General Accounting Office, the address should include "Attn: Bid Protest Control Unit."

(c) The initial protest filed with the General Accounting Office shall: (1) Include the name and address of the protester, (2) identify the contracting activity and the number of the solicitation and/or contract, (3) contain a statement of the grounds of protest, and (4) specifically request a ruling by the Comptroller General. A copy of the protest shall also be filed concurrently with the contracting officer and the communication to the General Accounting Office should so indicate.

The grounds for protest filed with the General Accounting Office must be fully supported to the extent feasible. See § 21.2(d) with respect to time for filing any additional statement required in support of an initial protest.

(d) No formal briefs or other technical forms of pleading or motion are required, but a protest and other submissions should be concise, logically arranged, and direct.

§ 21.2 Time for filing.

(a) Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest to the agency was filed in accordance with the time limits prescribed in paragraph (b) of this section, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. In any case, a protest will be considered if filed with the General Accounting Office within the time limits prescribed in paragraph (b) of this section.

(b) (1) Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested not later than the next closing date for receipt of proposals following the incorporation.

(2) In cases other than those covered in paragraph (b)(1) of this section, big protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier.

(3) The term "filed" as used in this section means receipt in the contracting agency or in the General Accounting Office as the case may be. Protesters are cautioned that protests should be transmitted or delivered in the manner which will assure earliest receipt. Except as provided in paragraph (c) of this section, any protest received in the General Accounting Office after the time limits prescribed in this section shall not be considered unless it was sent by registered or certified mail not later than the fifth day, or by mailgram not later than the third day, prior to the final date for filing a protest as specified herein. The only acceptable evidence to establish the date of mailing shall be in the U.S. Postal Service postmark on the wrapper or

on the original receipt from the U.S. Postal Service. The only acceptable evidence to establish the date of transmission by mailgram shall be the automatic date indication appearing on the mailgram. If the postmark in the case of mail or the automatic date indication in the case of a mailgram is illegible, the protest shall be deemed to have been filed late.

(c) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

(d) If an additional statement in support of the initial protest is required by the General Accounting Office, one copy shall be mailed or otherwise furnished to the General Counsel, General Accounting Office, and a copy shall be mailed or otherwise furnished to the contracting officer, not later than 5 days after receipt of notification from the General Accounting Office of the need for such additional statement.

(40 FR 17979, Apr. 24, 1975, as amended at 40 FR 60035, Dec. 31, 1975; 41 FR 2073, Jan. 14, 1976. Redesignated at 45 FR 68374, Oct. 15, 1980)

§ 21.3 Notice of protest, submission of agency report and time for filing of comments on report.

(a) The General Accounting Office shall notify the contracting agency by telephone and in writing within one day of the receipt of a protest, requesting the agency to give notice of the protest to the contractor if award has been made or, if no award has been made, to all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied. The agency shall be requested to furnish in accordance with applicable procurement regulations copies of the protest documents to such parties with instructions to communicate further directly with the General Accounting Office.

(b) Material submitted by a protester will not be withheld from any interested party outside the Government or from any Government agency which may be involved in the protest except to the extent that the withholding of information is permitted or required by law or regulation. If the protester considers that the protest contains material which should be withheld, a statement advising of this fact must be affixed to the front page of the protest document and the allegedly proprietary information must be so identified wherever it appears.

(c) The Office of General Counsel shall request the agency to submit a complete report on the protest to the General Accounting Office as expeditiously as possible (generally within 25

working days) in accordance with applicable procurement regulations, and to furnish a copy of the report to the protester and other interested parties.

(d) Comments on the agency report shall be filed with the Office of General Counsel within 10 days after receipt of the report, with a copy to the agency office which furnished the report and to other interested parties. Any rebuttal a protester or interested parties may care to make shall be filed with the Office of General Counsel, General Accounting Office, within 5 days after receipt of the comments to which rebuttal is directed, with a copy to the agency office which furnished the report, the protester, and interested parties, as the case may be. Unsolicited agency rebuttals shall be considered if filed within 5 days after receipt by the Agency of the comments to which rebuttal is directed.

(e) The failure of a protester or any interested party to comply with the time limits stated in this section may result in resolution of the protest without consideration of the comments untimely filed.

[40 FR 17979, Apr. 24, 1975, as amended at 40 FR 60035, Dec. 31, 1975; 41 FR 2073, Jan. 14, 1976. Redesignated at 45 FR 68374, Oct. 15, 1980.]

§ 21.4 Withholding of award.

When a protest has been filed before award the agency will not make an award prior to resolution of the protest except as provided in the applicable procurement regulations. In the event the agency determines that award is to be made during the pendency of a protest, the agency will notify the Comptroller General.

§ 21.5 Furnishing of information on protests.

The Office of General Counsel, General Accounting Office, shall, upon request, make available to any interested party information bearing on the substance of the protest which has been submitted by interested parties or agencies, except to the extent that withholding of information is permitted or required by law or regulation. Any comments thereon shall be submitted within a maximum of 10 days.

§ 21.6 Time for submission of additional information.

Any additional information requested by the Office of General Counsel, General Accounting Office, from the protester or interested parties shall be submitted no later than 5 days after the receipt of such request. If it is necessary to obtain additional information from the agency, the General Accounting Office will request that such information be furnished as expeditiously as possible.

[40 FR 60036, Dec. 31, 1975. Redesignated at 45 FR 68374, Oct. 15, 1980.]

§ 21.7 Conference.

(a) A conference on the merits of the protest with members of the Office of General Counsel, General Accounting Office, may be held at the request of the protester, any other interested party, or an agency official. Request for a conference should be made prior to the expiration of the time period allowed for filing comments on the agency report (see § 21.3(d)). Except in unusual circumstances, requests for a conference received after such time will not be honored.

(b) Conferences normally will be held prior to expiration of the period allowed for filing comments on the agency report. All interested parties shall be invited to attend the conference. Ordinarily, only one conference will be held on a bid protest.

(c) Any written comments to be submitted and as deemed appropriate by the General Accounting Office as a result of the conference must be received in the General Accounting Office within 5 days of the date on which the conference was held.

§ 21.8 Time for decision by Comptroller General.

The Comptroller General establishes a goal of 25 days for issuing a decision on a protest after receipt of all information submitted by all parties and the conclusion of any conference.

§ 21.9 Request for reconsideration.

(a) Reconsideration of a decision of the Comptroller General may be requested by the protester, any interested party who submitted comments during consideration of the protest, and any agency involved in the protest. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

(b) Request for reconsideration of a decision of the Comptroller General shall be filed not later than 10 days after the basis for reconsideration is known or should have been known, whichever is earlier. The term "filed" as used in this section means receipt in the General Accounting Office.

(c) A request for reconsideration shall be subject to these bid protest procedures consistent with the need for prompt resolution of the matter.

§ 21.10 Effect of judicial proceedings.

The Comptroller General may refuse to decide any protest where the matter involved is the subject of litigation before a court of competent jurisdiction or has been decided on the merits by such a court. The foregoing shall not apply where the court requests, expects, or otherwise expresses interest in the Comptroller General's decision.

3. January 31, 1985, letters from Judiciary Chairman Peter W. Rodino, Jr. to the Speaker and the Attorney General expressing concern over Justice Department decision, with February 22, 1985, response from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice.

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515

Ninety-ninth Congress

January 31, 1985

RECEIVED

FEB 4 - 1985

HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

The Speaker of the House
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Mr. Speaker:

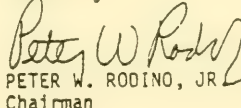
I recently learned of the November 17, 1984, letter from the Attorney General to the House of Representatives stating that the Department of Justice will refrain from defending and will direct the Executive Branch to refuse to execute certain bid protest provisions of the Competition in Contracting Act of 1984, which was enacted as part of the Deficit Reduction Act of 1984, Public Law No. 98-369, 98 Stat. 494 (1984).

The letter from the Attorney General raises important constitutional issues of separation of powers for the Committee, and the entire Congress, to consider. For your information, I am enclosing a copy of my letter to the Attorney General regarding this matter.

It is the responsibility of the Judiciary Committee, through its oversight and authorization process, to examine and evaluate the operations of the Department of Justice, and to ensure that the Department is faithfully executing the law. The Committee intends to explore the issues raised by the Attorney General's letter during its authorization hearings this year and to continue to monitor this situation in the future. Thus, it is important that the Committee be apprised of any future cases in which the Attorney General notifies the House that the Department will not defend a statute, or that the Department will direct agencies to refuse to execute a statute.

Therefore, I hereby request that in the future you forward to this Committee a copy of any such notifications by the Attorney General to the House. This will allow the Committee to carry out its responsibilities in overseeing the Department of Justice.

Sincerely


 PETER W. RODINO, JR.
 Chairman

Enclosure
 PWR/jpc

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515

Ninety-ninth Congress

January 31, 1985

Honorable William French Smith
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

On November 21, 1984, you submitted a notification to the Speaker of the House pursuant to Section 203(a) of Public Law No. 98-411, 98 Stat. 1545, by continuing the authorities contained in Section 21 of Public Law No. 96-132, 93 Stat. 1049-50.

This notification stated that the Department of Justice will refrain from defending certain bid protest provisions of the Competition in Contracting Act of 1984 (enacted as part of the Deficit Reduction Act of 1984, Public Law No. 98-369) in any court, administrative or other proceeding in which execution of the provision is sought. This decision was based on the Department's conclusion that these bid protest provisions are unconstitutional.

Your notification further stated that the Department has determined that federal agencies should not execute these bid protest provisions of the Competition in Contracting Act of 1984 (CICA). Pursuant to this determination by the Department, on December 17, 1984, the Office of Management and Budget issued Bulletin No. 85-8, which informed all Executive Branch agencies and departments that they should not comply with the bid protest provisions of the CICA.

I am deeply concerned about the position the Department has taken in directing agencies to ignore certain provisions of the CICA on the grounds that these provisions are unconstitutional.

To quote the Memorandum for the Attorney General, which was attached to your letter to the Speaker:

The division of delegated powers was designed "to assure, as nearly as possible that each Branch of Government would confine itself to its assigned responsibility." INS. v. Chadha, 103 S. Ct. at 2784. This division obliges the branches both to confine themselves to their constitutionally prescribed roles and not to interfere with exercise by the other branches of their constitutional duties. Thus, the doctrine of separation of powers "may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." Id. at 2790 (Powell, J. concurring) (citations omitted).

The doctrine of separation of powers applies to the Executive Branch no less than the Legislative Branch. Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579, 587-588 (1952). Under this doctrine, only the courts have the authority to finally interpret the Constitution. United States v. Nixon, 418 U.S. 683, 704 (1974).

It is clearly a Department function to make an initial interpretation of the terms and application of a statute. It is quite another matter for the Department, on behalf of the President, to direct agencies to refuse to comply with that statute. "To contend, that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." Kendall v. the United States, 12 P.L. (37 U.S.) 524, 613 (1838).

In this particular instance, the responsibility of the Executive Branch to comply with the CICA pending a judicial determination of constitutionality is thrown into stronger light because of the President's own actions. Here the President stated that certain provisions of the CICA were unconstitutional at the very time that he signed the act in which they were contained (Statement on Signing H.R. 4170 Into Law, July 18, 1984). While it would have been wholly appropriate for the President to veto the act on the grounds that portions of it were unconstitutional (in fact, it could be argued that it was his constitutional duty to veto such an act), it is an entirely different matter for the President to determine a bill is unconstitutional, sign that bill into law, and then refuse to comply with that law's provisions on the ground that it is unconstitutional.

A unilateral Executive Branch decision to rule a statute unconstitutional and to refuse to comply with it on the basis of that ruling is a usurpation of a judicial power and a failure by the President to properly exercise his own constitutional duty to "take care that the Laws be faithfully executed." U.S. Constitution, Article II, Section 3. Until a judicial determination on the constitutionality of a statute, it is the responsibility of government officials, no less than average citizens, to comply with that statute.

Your notification of November 21, 1984, states that one of the purposes of Executive Branch refusal to comply with the CICA is to assure expeditious determination of its constitutionality by the courts. You assert that "it is doubtful that anyone would have standing to raise these constitutional issues if the Executive Branch fully executed the subject provisions.". It is true that judicial consideration of important constitutional issues can be delayed because of difficulty in bringing such issues quickly before the courts (as was the case with legislative veto for a number of years). However, an aggrieved bidder would have standing to challenge the constitutionality of the CICA if a stay were imposed due to the filing of a protest (See *Scanwell Laboratories, Inc. v. Shaffer*, 424 F. 2d 859 (1970)). Also, any contract bidders could seek a determination of constitutionality of the CICA under the Declaratory Judgment Act, 28 U.S.C. 2201 and 2202. In either situation, the Department of Justice could intervene to raise the issue of the CICA's constitutionality.

It is the responsibility of this Committee, through its oversight and authorization process, to examine and evaluate the operations of the Department of Justice, and to assure that the Department is faithfully executing the law. As discussed above, your letter to the Speaker regarding your position on the CICA, and the directions you have issued to the Executive Branch regarding its implementation, raise serious issues for the Committee to examine as it prepares for authorization hearings this spring.

Therefore, I hereby request that you provide a full report to the Committee by February 15, 1985, on the legal precedent and authority for the Department of Justice to direct agencies to refrain from complying with a statute and a list of all statutes regarding which the Department has issued such directions.

I am also concerned about the Department's refusal to defend certain statutes. The provision pursuant to which the Department notifies Congress of such a refusal was in no way intended to ratify that practice. (See Debates on Amendments by Mr. Levitas, Congressional Record, September 28, 1978, p. 32423 et. seq., and Congressional Record, October 16, 1979, p. 28475 et. seq.) The Committee also intends to address this issue in the authorization hearings.

Therefore, I further request that by February 15, 1985, you submit a separate report on the legal precedent and authority for the Department of Justice to refrain from defending the validity of a statute. This report should include: 1) a full list of those statutes which the Department has refused to defend; 2) the precise grounds for the refusal regarding each statute; 3) the date on which each case regarding any such statute was filed; 4) the date on which Congress was notified of each case; and 5) each case, if any, of which the Congress was not notified.

Sincerely,

PETER W. RODINO, JR.
Chairman

PWR/jpc



Office of the Attorney General

Washington, D. C. 20530

February 22, 1985

RECEIVED

FEB 25 1985

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

JUDICIARY COMMITTEE

Dear Chairman Rodino:

Thank you for your letter of January 31, 1985, and the opportunity to explain further this Department's position with respect to its duty to enforce and defend certain provisions of the Competition in Contracting Act of 1984 (CICA), which was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

Your letter requested reports concerning the legal precedent and authority for the Department's directing agencies to refrain from complying with those provisions of the statute and the Department's expressed intention to refrain from defending the validity of those aspects of the statute in future litigation. You also requested lists of all instances in which the Department has determined not to execute or not to defend a statute. Because the legal theories and precedents underlying the Executive Branch's decisions not to execute or not to defend a statute are inextricably intertwined, I have combined in the following paragraphs the discussion of the historical practice and precedents in this area. The Department has also attempted within the time available to compile a list, set forth in the Appendix to this letter, of all refusals to execute or defend statutes and to provide as much of the additional information you requested as possible. 1/ Given the records available, we cannot be confident that we have identified every such instance prior to this Administration.

1/ We have not created separate lists for refusals to defend statutes and refusals to execute statutes because the two categories overlap. Thus, for example, in Myers v. United States, 272 U.S. 52 (1926), the President first refused to execute a statute prohibiting removal of a postmaster, and then contested

(Footnote continued)

My determination that the bid protest provisions at issue should neither be defended nor executed by the Executive Branch is inextricably bound up in the substantive constitutional defects of those provisions. 2/ The new bid protest provisions, enacted as Subtitle D of the Competition in Contracting Act of 1984, are described in considerable detail in the October 17, 1984, memorandum of the Office of Legal Counsel to me on this subject, a copy of which I have enclosed with this letter, and need not be fully set forth here. As that memorandum points out, it would be plainly unconstitutional under the Supreme Court's decision in INS v. Chadha, 103 S. Ct. 2764 (1983), to vest in the Comptroller General the power to lift the "stay" automatically imposed by the CICA whenever a bid protest is filed because that action would affect the legal rights, duties, and relations of Executive Branch officials. After Chadha, the Comptroller General, as an arm of Congress, can no more be assigned veto power than can a committee of Congress. Likewise, the provisions of the CICA purporting to

1/ (Continued)

the constitutionality of that statute in the litigation arising from the removal. We have provided sufficient parenthetical information for each instance listed to describe the nature of the Executive's actions. Also, when a single issue of constitutionality of a statute has been the subject of numerous separate lawsuits, we have listed only the lead case, as with INS v. Chadha in the area of legislative veto devices and In Re Alexander Benny for the current litigation concerning the appointments provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Since the first enactment of the notification provision in 1979, § 21(a) of Pub. L. No. 96-132, 93 Stat. 1049-50, we are not aware of any decision by the Department not to execute or defend an Act of Congress which has not been the subject of an appropriate notification to Congress.

Finally, we have not included instances in which the Solicitor General determined not to appeal to the Supreme Court a lower court judgment holding an Act of Congress unconstitutional. These cases do not appear to fall within the concerns expressed in your letter because in each of them the Department defended the constitutionality of the statutes in question in the lower courts, but the Solicitor General, having considered all pertinent factors, many of which were not relevant in the lower court, decided not to pursue Supreme Court review of the adverse decision.

2/ The Executive Branch's constitutional objections to these provisions were stated clearly to Congress in a letter from this Department of April 20, 1984, to Chairman Brooks of the House Committee on Government Operations well before their enactment.

authorize the Comptroller General to 'assess reasonable attorneys' fees and bid preparation costs are unconstitutional. These provisions would give the Comptroller General the authority to bind the Executive Branch and therefore are clearly inconsistent with the principles of Chadha.

I turn now to the legal precedent and authority for the decision not to execute or to defend the CICA. This position is based upon the fact that in addition to the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress, the President also has a constitutional duty to protect the Presidency from encroachment by the other branches. He takes an oath to "preserve, protect and defend" the Constitution. An obligation to take action to resist encroachments on his institutional authority by the legislature may be implied from that oath, especially when he may determine it prudent to present his point of view in court. In this regard, we believe that the President must, in appropriate circumstances, resist measures which would impermissibly weaken the Presidency: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 103 S. Ct. at 2784 (emphasis added).

The President's veto power is usually adequate to express and implement his judgment that an Act of Congress is unconstitutional. By exercising his veto power, the President may fulfill his responsibility under the Constitution and also impose a check on the power of Congress to enact statutes that violate the Constitution. On some occasions, however, the exercise by the President of his veto power may not be feasible. For example, an unconstitutional provision may be a part of a larger and vitally necessary piece of legislation. The Supreme Court has held that the President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects. See INS v. Chadha, *supra*, 103 S. Ct. 2764, (1983); Myers v. United States, 272 U.S. 52 (1926).

The following words of President Andrew Johnson's counsel in an early recorded statement 3/ specifically address the President's responsibilities:

3/ Years earlier, President Jefferson, believing that Congress had no constitutional power to grant authority to the courts to control executive officers through the issuance of writs of mandamus, refused to have his Attorney General appear, except as a reluctant witness, and defend the constitutionality of a statute in the case of Marbury v. Madison, 1 Cranch 137 (1803), an original action before the Supreme Court. The Court ultimately held the statute unconstitutional.

If the law be upon its very face in flat contradiction of plain expressed provisions of the Constitution, as if a law should forbid the President to grant a pardon in any case, or if the law should declare that he should not be Commander-in-Chief, or if the law should declare that he should take no part in the making of a treaty, I say the President, without going to the Supreme Court of the United States, maintaining the integrity of his department, which for the time being is entrusted to him, is bound to execute no such legislation; and he is cowardly and untrue to the responsibility of his position if he should execute it.

2 Trial of Andrew Johnson 200 (Washington 1868). This statement, of course, was made in the context of the attempt to impeach President Johnson for, *inter alia*, having refused to obey the Tenure in Office Act, an act "which he believed with good reason . . . to be unconstitutional . . ." 38 Op. A.G. 252, 255 (1935).

This duty to preserve the institution of the Presidency, captured in the words of President Andrew Johnson's counsel, was articulated eloquently and more authoritatively by Chief Justice Chase, who presided over the trial in the Senate of President Johnson. Chief Justice Chase declared that the President has no duty to execute a statute that:

directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

* * *

How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to have passed in violation of it? 4/

4/ R. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase 685 (1874). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that the Tenure of Office Act was unconstitutional. *Id.* See M. Benedict, The Impeachment and Trial of Andrew Johnson 154-55 (1973). Ultimately, the Senate admitted evidence that the President had desired to initiate a court test of the law. *Id.* at 156.

(Emphasis in original.) If the President does not resist intrusions by Congress into his sphere of power, Congress may not only successfully shift the balance of power in the particular case but may succeed in destroying the presidential authority and effectiveness that would otherwise act as a check of Congress's exercise of power in other circumstances.

The major historical examples of refusals by the Executive to enforce or defend an Act of Congress have been precipitated for the most part by Congress's attempt to alter the distribution of constitutional power by arrogating to itself a power which the Executive believes the Constitution does not confer on Congress but, instead, reposes in him. In such situations, a fundamental conflict arises between the two Branches, and this conflict has generally resulted in Attorneys General presenting to the courts the Executive's view of what the Constitution requires. The potential for such a conflict arising was expressly recognized by Attorney General Palmer in 1919 when he opined that the general duty of the Attorney General to enforce a statute did not apply in the case of a conflict between the executive and the legislature. See 31 Op. A.G. 475, 476 (1919).

Seven years later, this exception to the general rule was applied when the President acted contrary to a statute prohibiting the removal of a postmaster. That act led to the Executive challenging successfully the Act's constitutionality in litigation brought by the removed postmaster. Myers v. United States, 272 U.S. 52 (1926). Myers appears to be the first case to reach the Supreme Court in which the Executive acted contrary to and then directly challenged the constitutionality of a federal statute in court:

In the 136 years that have passed since the Constitution was adopted, there has come before this Court for the first time, so far as I am able to determine a case in which the government, through the Department of Justice, questions the constitutionality of its own act.

Id. at 57 (condensation of oral argument for counsel for appellant Myers). 5/

5/ It is perhaps noteworthy that this condensation of the argument of appellant Myers' counsel goes on to record counsel's view that as to the appearance of the Department of Justice in opposition to the statute, "I have no criticism to offer; I think it is but proper." Further, that condensation of the oral argument does not record any observations whatsoever on this point by Senator George Wharton Pepper, who appeared as counsel for the Senate and House of Representatives as amicus curiae. See 272 U.S. at 65-77.

Almost a decade later, the Executive argued, unsuccessfully, that § 1 of the Federal Trade Commission Act would be unconstitutional if interpreted to prohibit the President's removal of a member of the Federal Trade Commission except for the causes set forth in the statute. Humphrey's Executor v. United States, 295 U.S. 602 (1935). Shortly thereafter, the Executive carried out, but then refused to defend when sued, and indeed successfully challenged the constitutionality of, a statute which directed that the salaries of certain federal employees not be paid. United States v. Lovett, 328 U.S. 303 (1946). 6/ In 1976, the Appointments Clause was once again at issue when the Executive challenged, successfully, the appointment of members of the Federal Election Commission by members of Congress. Buckley v. Valeo, 424 U.S. 1 (1976).

In addition to these examples, there have been a number of cases in which the Executive has challenged the constitutionality of legislative veto devices. See, e.g., INS v. Chadha, supra, 103 S. Ct. 2764 (1983). As is true of the other cases discussed above, the Chadha Court never suggested that there was any impropriety in the Executive's conduct in contesting Acts of Congress he believed trenchd on his constitutional prerogatives.

Although I believe that the decision of Attorney General, Bell to enforce the legislative veto device at issue in Chadha until held unconstitutional by the courts was not inappropriate, I note that in 1955, almost three decades before Chadha was decided, President Eisenhower instructed the Secretary of Defense to ignore another legislative veto device contained in the Department of Defense Appropriation Act, a so-called "committee approval" provision, by stating in a signing statement that that provision "will be regarded as invalid by the Executive Branch of the Government . . . unless otherwise determined by a court of competent

6/ The Supreme Court decided that the statute in question was unconstitutional as a bill of attainder, a constitutional defect not necessarily suggesting a clash between legislative and executive power. Because the statute was directed at subordinates of the President, however, the case took on that separation of powers characteristic both as regards the bill of attainder issue and, more specifically, with respect to the argument advanced by the employees and joined in by the Solicitor General that the statute at issue constituted an unconstitutional attempt by Congress to exercise the power to remove Executive Branch employees. See United States v. Lovett, 328 U.S. 303 (1946), Br. for United States at 10-56.

jurisdiction." Public Papers of the Presidents: Dwight D. Eisenhower 689 (1955). In 1963, President Kennedy stated that the unconstitutional features of another committee approval device would be ignored, with the provision to be treated as a "request for information." Public Papers of the Presidents: John F. Kennedy 6 (1963). President Johnson also made clear that the unconstitutional aspects of legislative veto devices would be ignored. Public Papers of the Presidents: Lyndon B. Johnson 104, 1250 (1963-64). President Johnson instructed the Secretary of Agriculture, in connection with the making of loans under an amendment to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1010-12, "to refrain from making any loans which would require committee approval." 2 Weekly Comp. Pres. Doc. 1676 (1966).

My decision that the Executive Branch would not implement or defend certain provisions of the Competition in Contracting Act is completely consistent with the Supreme Court's decision in Chadha and the publicly stated position of this Administration that the Executive would, subsequent to Chadha, observe only the constitutional "report and wait" features of legislative veto devices. 7/ This decision also had the coincidental and desirable effect of enhancing the potential for judicial review of the constitutional issues.

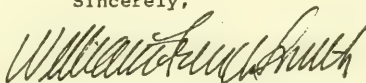
As I stated in my letter of November 21, 1984, notifying Congress that the Department had determined that federal agencies should not execute certain provisions of CICA, it is doubtful that anyone would have standing to raise the important constitutional issues presented by the disputed provisions if the Executive Branch were to execute them fully. It may be possible, as you suggest in your letter, that if the Executive Branch were to execute the disputed provisions a case might eventually arise in which a court might find that a party had standing to raise those constitutional issues. On the other hand, the disputed provisions might well never reach the courts, especially given the likelihood that such cases would become moot before judicial determination, and the Executive would then be implementing indefinitely provisions that it believes trench on the President's constitutional prerogatives. The foregoing authorities establish that the President is not required to execute such an act provisionally against the day that it is declared unconstitutional by the courts. See Myers v. United

7/ Hearings on the U.S. Supreme Court Decision Concerning the Legislative Veto, before the House Committee on Foreign Affairs, 98th Cong., 1st Sess. 52 (1983) (statement of Deputy Attorney General Schmults).

States, supra, 272 U.S. 52. Moreover, my advice to Executive Branch agencies not to implement the disputed provisions has the beneficial byproduct of increasing the likelihood of a prompt judicial resolution. Thus, far from unilaterally nullifying an Act of Congress, the Department's actions are fully consistent with the allocation of judicial power by the Constitution to the courts.

I trust that this letter has been responsive to your concerns.

Sincerely,

A handwritten signature in dark ink, appearing to read "William French Smith", written in a cursive style.

William French Smith
Attorney General

APPENDIX

Executive Refusals To Defend Or Execute Statutes

Trial on Impeachment of Andrew Johnson (The principal charge against Johnson was that he deliberately violated the Tenure in Office Act by removing Secretary Stanton without Senate consent; Johnson believed the statute unconstitutional, a position upheld years later in Myers v. United States, *infra*.)

Myers v. United States, 272 U.S. 52 (1926) (The Department of Justice successfully argued that a statute which would have prohibited the President from terminating a local postmaster was unconstitutional.)

Humphrey's Executor v. United States, 295 U.S. 602 (1934) (The Court rejected the Executive's claim that a member of the Federal Trade Commission could be removed because of a dispute over policy notwithstanding a statute prohibiting removal except for inefficiency, neglect of duty or malfeasance.)

Lovett v. United States, 328 U.S. 303 (1946) (The Department of Justice successfully contested the constitutionality of a statute directing that salaries of certain officials not be paid.)

Simpkins v. Moses H. Cone Memorial Hospital, 211 F. Supp. 628 (M.D.N.C. 1962), *rev'd* 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), (The United States intervened in a private civil rights action to contest, ultimately successfully, the constitutionality of a statute providing federal funds for "separate but equal" facilities.)

Buckley v. Valeo, 424 U.S. 1 (1975) (The Attorney General argued and the Supreme Court held that certain powers of the Federal Election Commission could not be exercised by a body with congressional appointees consistent with the Appointments Clause.)

18 U.S.C. § 1461 and 39 U.S.C. § 3001(e) (By letters of January 13, 1981, Attorney General Civiletti advised Congress that he had established a policy of nonenforcement of these provisions imposing criminal penalties for mailing or delivering certain advertisements and materials relating to abortion or contraception.)

League of Women Voters v. FCC (C.D. Cal., No. CV 79-1562-MML(PX), later decided by the Supreme Court as FCC v. League of Women Voters, 104 S. Ct. 3106 (1984)(By letters dated October 11, 1979, former Attorney General Civiletti advised Congress that the Department would not defend the constitutionality of 47 U.S.C. § 399(a) which prohibited public broadcasting stations from editorializing and supporting or opposing political candidates; by letter of April 6, 1981, Attorney General Smith reversed this position.)

INS v. Chadha, 103 S. Ct. 2764 (1983)(In this and a number of other cases the Department of Justice challenged the constitutionality of legislative veto devices; the Supreme Court declared such devices unconstitutional in this case.)

In Re Alexander Benny, Civ. No. 84-120 MISC RHS Bky., 3-82-0 0972 LK (N.D. Cal.)(In this and a number of subsequent cases raising the same issue, currently pending in the courts, the Department of Justice contends that the appointment provisions of §§ 106 and 121(e) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 are unconstitutional; Congress was notified by letters from Attorney General Smith dated September 25, 1984 of the Department's position.)

Competition in Contracting Act of 1984, enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (Attorney General Smith advised Congress by letters of November 21, 1984 of the Department's conclusion that certain provisions of the Act are unconstitutional and should not be enforced by Executive Branch agencies.)

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

OCT 17 1984

MEMORANDUM FOR
THE ATTORNEY GENERAL

Re: Implementation of the Bid Protest Provisions of the
Competition in Contracting Act

This memorandum responds to the President's request that this Department advise Executive Branch agencies regarding how they may implement the bid protest provisions of the Competition in Contracting Act of 1984 ("CICA" or "the Act"), which was enacted as part of the Deficit Reduction Act of 1984. Pub. L. No. 98-369, 98 Stat. 494 (1984). In a signing statement on the Deficit Reduction Act, the President, on the advice of this Department, raised constitutional objections to certain provisions that delegate to the Comptroller General the power to perform duties that may not be carried out by the Legislative Branch. The President instructed this Department to advise Executive Branch agencies with respect to how they could comply with the Act in a manner consistent with the Constitution. This memorandum provides the advice requested by the President.

I

BACKGROUND

The new bid protest provisions were enacted as Subtitle D of the CICA. These provisions expressly permit any "interested party" 1/ to file "[a] protest concerning an alleged violation

1/ "Interested party" is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551. (Citations to the new bid protest provisions will be to the United States Code sections, as those sections are set forth in the CICA.)

of a procurement statute or regulation . . . , " and authorize the Comptroller General to decide such a protest under procedures to be established by the Comptroller General. See 31 U.S.C. § 3552. These provisions provide the first explicit statutory authorization for the Comptroller General's review of bid protests. Previously, all bid protests were considered on the basis of regulations published under the more general statutory provision that purports to authorize the Comptroller General to settle the accounts of the United States Government. See 31 U.S.C. § 3526.

The CICA requires the Comptroller General to notify the federal agency involved in the protest, which is then required to submit to the Comptroller General a complete report on the protested procurement, "including all relevant documents," within 25 working days of the agency's receipt of notice. 31 U.S.C. § 3553(b). As a general rule, the CICA requires the Comptroller General to issue a final decision on a protest within 90 working days from the date the protest is submitted to the Comptroller General. These time deadlines, however, may be altered by the Comptroller General if he determines and states in writing that the specific circumstances of the protest require a longer period. The Act also provides for a so-called "express option" for deciding protests that the "Comptroller General determines suitable for resolution within 45 calendar days from the date the protest is submitted." Finally, the Comptroller General may dismiss a protest that the "Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest." 31 U.S.C. § 3554(a).

The Act expressly requires that if a protest is filed prior to a contract award, "a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending." 31 U.S.C. § 3553(c)(1). The procuring agency may avoid this "stay" only if the "head of the procuring activity" makes a "written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General" The Comptroller General must be advised of this finding, and the finding may not be made "unless the award of the contract is otherwise likely to occur within 30 days thereafter." See 31 U.S.C. § 3553(c)(3).

If a bid protest is filed within ten days after the date a contract is awarded, the procuring agency is required "upon receipt of that notice, immediately [to] direct the contractor

to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending." 31 U.S.C. § 3553(d)(1). As is true with respect to a pre-award protest, the head of the procuring activity may "waive" the "stay" upon a written finding that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest." In addition, however, the Act provides an additional ground for waiver of a post-award stay upon a written finding "that performance of the contract is in the best interests of the United States." 31 U.S.C. § 3553(d)(2).

With respect to remedies, the Act authorizes the Comptroller General to determine whether a solicitation or proposed award complies with applicable statutes and regulations and, if not, to recommend that the procuring agency take certain specified types of action. The Act does not purport to give the Comptroller General the authority to issue binding decisions on the merits of the protest. The Act does, however, state that if the Comptroller General determines that a solicitation or award does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of "filing and pursuing the protest, including reasonable attorneys' fees" and "bid and proposal preparation." 31 U.S.C. § 3554(c)(1). In addition, the Act states that these monetary awards "shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services." 31 U.S.C. § 3554(c)(2).

Finally, the Act requires the head of a procuring activity to report to the Comptroller General if the procuring agency has not fully implemented the Comptroller General's recommendations within 60 days after receipt of those recommendations. The Comptroller General is then required to submit a yearly report to Congress describing each instance in which a federal agency did not fully implement the Comptroller General's recommendations. 31 U.S.C. § 3554(e)(2).

The Department of Justice commented on similar bid protest provisions when they were under consideration by Congress as part of H.R. 5184. See Letter to Honorable Jack Brooks, from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (April 20, 1984). At that time the Department specifically objected to the stay provisions on the ground that they would unconstitutionally vest

an arm of the Legislature with the power to control Executive Branch actions. The Department specifically concluded that the stay provision "must be deleted because of this constitutional infirmity." Id. at 3. In addition, the Department objected to the provision in H.R. 5184 purporting to authorize the Comptroller General to enter a legally binding award of attorney's fees and bid preparation costs. We pointed out that this provision unconstitutionally granted the Comptroller General executive or judicial authority in a manner inconsistent with the separation of powers and that, accordingly, the section "must be deleted in order to remove this substantial concern." Id. The Department's objections went unheeded, and both provisions were enacted into law.

When the Deficit Reduction Act of 1984 was presented to the President for his signature, he specifically objected in a signing statement to the bid protest provisions upon which the Department had previously commented:

I am today signing H.R. 4170. In signing this important legislation, I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch. This administration's position on the unconstitutionality of these provisions was clearly articulated to Congress by the Department of Justice on April 20, 1984. I am instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply with the provisions of this bill in a manner consistent with the Constitution.

20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

II

THE CONSTITUTIONAL ROLE OF THE COMPTROLLER GENERAL

In order to analyze the constitutionality of the bid protest provisions of the CICA, it is necessary first to understand what types of functions the Comptroller General may (and may not)

perform under the constitutionally prescribed separation of powers. This analysis first involves consideration of where the Comptroller General fits within the tripartite structure established by the Constitution. It is then necessary to determine, given the Comptroller General's place in that structure, what duties he may constitutionally perform.

A. The Comptroller General's Position in the Tripartite Structure of the Federal Government

The Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921. See 42 Stat. 23 (1921). The Budget and Accounting Act expressly stated that the Comptroller General is "independent of the executive departments" Id. Subsequent legislation made it clear that the Comptroller General is part of the Legislative Branch. The Reorganization Act of 1945 specified that, for the purpose of that Act, the term "agency" meant any executive department, commission, independent establishment, or government corporation, but did "not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." 59 Stat. 616 (1945). The same provision was included in the Reorganization Act of 1949. See 63 Stat. 205 (1949). The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General "as an agent of the Congress" 64 Stat. 835 (1950).

Although the President nominates and, with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General, even for cause. See 31 U.S.C. § 703 (1982). The Comptroller General is appointed for a fifteen-year term, but he may be removed either by impeachment or by a joint resolution of Congress, after notice and an opportunity for hearing, for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1). Given the breadth of the grounds of removal, particularly the terms "inefficiency" and "neglect of duty," Congress enjoys a relatively unlimited power over the tenure in office of the Comptroller General. 2/

2/ The Supreme Court has recognized that the power to remove an official is necessarily linked to the power to supervise and control the actions of that official. See Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935).

This broad power of removal was intended to give Congress the right effectively to control the Comptroller General, as the following excerpts from the legislative history of the Budget and Accounting Act demonstrate:

MR. FESS. In other words, the man who is appointed may be independent of the appointing power, and at the same time if the legislative branch finds that he is not desirable, although he may be desirable to the appointing power, the legislative branch can remove him?

MR. HAWLEY. Yes;

58 Cong. Rec. 7136 (1919).

[I]f the bill is passed this would give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal.

Id. at 7211 (remarks of Rep. Temple).

On the basis of these statutory provisions, it has become generally accepted that the Comptroller General is an arm of Congress and is within the Legislative Branch. The Department of Justice has consistently taken the view that the Comptroller General is a "legislative officer." See, e.g., Testimony of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, before the Subcommittee on Legislation and National Security, House Committee on Government Operations, 95th Cong., 2d Sess. (June 26, 1978). The courts have also reached the conclusion that the Comptroller General is "an arm of the legislature." See Delta Data Systems Corp. v. Webster, No. 84-5356, slip op. at 9 n.1 (D.C. Cir. Sep. 21, 1984); M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971). In addition, scholars and commentators have recognized the position of the Comptroller General within the Legislative Branch and his direct accountability to Congress. See R. Brown, The GAO: Untapped Source of Congressional Power (1970); F. Mosher, The GAO: The Quest for Accountability in American Government (1979); Willoughby, The Legal Status and Functions of the General Accounting Office of the National Government (1927); Cibinic and Lasken, The Comptroller General and Government Contracts, 38 Geo. Wash. L. Rev. 349 (1970); see also The United States Government Manual 1984/85 at 40.

The extent of the Comptroller General's direct accountability to Congress is perhaps best demonstrated by publications of Congress itself and of the General Accounting Office (GAO), which the Comptroller General heads. 3/ In 1962, the Senate Committee on Government Operations published a report that described the GAO as:

a nonpolitical, nonpartisan agency in the legislative branch of the Government created by the Congress to act in its behalf in examining the manner in which Government agencies discharge their financial responsibilities with regard to public funds appropriated or otherwise made available to them by the Congress and to make recommendations looking to greater economy and efficiency in public expenditures.

S. Doc. No. 96, 87th Cong., 2d Sess., Functions of the U.S. General Accounting Office 1 (1962).

A recent publication of the GAO states that although the Comptroller General is appointed by the President with the advice and consent of the Senate, the Comptroller General has "line responsibility to the Congress alone." United States General Accounting Office, GAO 1966-1981, An Administrative History 84 (1981). The same publication states that while "the Comptroller General has been established by the Congress with a great measure of discretion in independent action, he is fully accountable to the Congress. The Congress has by law and by practice exercised its accountability in several different ways." Id. at 258. This direct accountability undoubtedly has an impact on the positions and conclusions the Comptroller General reaches on public issues. For example, the GAO has stated that "as an agent of Congress, GAO has always considered it inappropriate to question the constitutionality of a statute enacted by the Congress" General Accounting Office, Principles of Federal Appropriations Law 1-7 (1982).

3/ Because the Comptroller General and the GAO are both "a part of the legislative branch of the Government," we treat them as equivalents for the purposes of this constitutional analysis. See Reorganization Act of 1949, 63 Stat. 205 (1949).

Thus, the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees. The scope of this power is discussed below.

B. The Duties That May Constitutionally Be Performed by An Agent of the Legislative Branch

The fundamental principle of the United States Constitution is the division of federal power among three branches of government. The term "separation of powers" does not appear in the Constitution nor does that concept manifest itself in one specific provision of the Constitution. The Supreme Court has emphasized, however, that the separation of powers "is at the heart of our Constitution . . . , and the Court has recognized "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." Buckley v. Valeo, 424 U.S. 1, 119-20 (1976). "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." Id. at 124. "The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers" INS v. Chadha, 103 S. Ct. 2764, 2781 (1983). In The Federalist No. 47, James Madison defended this tripartite arrangement in the Constitution by reference to Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct:

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would

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then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

The Federalist No. 47, 303 (New American Library Ed. 1961) (emphasis in original); see Buckley v. Valeo, 424 U.S. 1, 120-21 (1976).

The division of delegated powers was designed "to assure, as nearly as possible, that each Branch of Government would confine itself to its assigned responsibility." INS v. Chadha, 103 S. Ct. at 2784. This division obliges the branches both to confine themselves to their constitutionally prescribed roles and not to interfere with exercise by the other branches of their constitutional duties. Thus, the doctrine of separation of powers "may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." Id. at 2790 (Powell, J. concurring) (citations omitted).

This constitutionally prescribed separation of powers is not merely a theoretical concept; it creates enforceable limits upon the powers of each branch. The Supreme Court has emphasized that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." Buckley v. Valeo, 424 U.S. at 123. Thus, the separation of powers is a vital part of the structure of the Constitution and the federal government, and it operates as an enforceable limit on the ability of one branch to assume powers that properly belong to another.

At various times in the Nation's history, the Supreme Court has acted to restrain each of the other branches from overstepping its proper constitutional role. In particular, the Court has been sensitive to the need to limit Congress to the performance of its legislative duties and not permit it to usurp executive or judicial functions. The Court has observed that because of the Framers' specific concerns about the potential abuse of legislative power, "barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments." United States v. Brown, 381 U.S. 437, 444 (1965). In Springer v. The Philippine Islands, 277 U.S. 189 (1928), the Court stated:

Legislative power, as distinguished from executive power, is the authority to make

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laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

277 U.S. at 202.

In Myers v. United States, 272 U.S. 52 (1926), the Court held that Congress could not limit or interfere with the President's ability to remove executive officials:

Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices [T]he provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, [senate advice and consent] in the work of the executive, are limitations to be strictly construed and not to be extended by implication

272 U.S. at 164.

In Buckley v. Valeo, the Court ruled that Congress was barred by the Appointments Clause from appointing Officers of the United States, whom it defined as those "exercising significant authority pursuant to the laws of the United States." 424 U.S. at 126. In so holding, the Court expressly recognized that Congress's broad power under the Necessary and Proper Clause extends only so far as its legislative authority, and does not expand that authority to encompass the exercise of executive powers:

The proper inquiry when considering the Necessary and Proper Clause is not the authority of Congress to create an office or a commission, which is broad indeed, but rather its authority to provide that its own officers may make appointments to such office or commission.

So framed, the claim that Congress may provide for this manner of appointment

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under the Necessary and Proper Clause of Art. I stands on no better footing than the claim that it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint Officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

Id. at 134-35.

Finally, the Supreme Court has most recently and thoroughly considered the scope of Congress's authority to act other than by plenary legislation in INS v. Chadha. In Chadha, the Court declared unconstitutional a one-house legislative veto provision. In so doing, the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto:

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.

103 S. Ct. at 2782. When Congress takes action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," it must act by passing a law and submitting it to the President

in accordance with the Presentment Clauses and the constitutionally prescribed separation of powers. Id. at 2784 (emphasis added). The Court emphasized that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." Id. at 2786. 4/

Finally, with respect to Congress's power over the Legislative Branch, the Court concluded:

One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Id. at 2786 n.20 (emphasis added).

These principles have never been directly applied by a court to establish the constitutional limits on Congress's authority to assign duties to the Comptroller General. In

4/ As the Court noted, there are only four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto: the power of the House of Representatives to initiate impeachment, the power of the Senate to try individuals who have been impeached by the House; the power of the Senate to approve or disapprove presidential appointments; and the power of the Senate to ratify treaties negotiated by the President. See 103 S. Ct. at 2786.

particular, we are aware of no court decision that has ever held that the Comptroller General may constitutionally perform executive duties or take actions that bind individuals outside the Legislative Branch. 5/ Some courts have, in dictum, noted that the Budget and Accounting Act purports to give the Comptroller General broad power to bind the Executive Branch. See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1 (1927); United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 100 (D.D.C.), aff'd, 339 F.2d 753 (D.C. Cir. 1964). Other courts have stated, solely on the basis of statutory language and without considering any possible constitutional issues, that the Comptroller General's settlement of accounts is binding on the Executive Branch. See United States v. Standard Oil Co., 545 F.2d 624, 637-38 (9th Cir. 1976); Burkley v. United States, 185 F.2d 267 (7th Cir. 1950); Pettit v. United States, 488 F.2d 1026 (Ct. Cl. 1973). In none of these cases, however, did the courts consider generally the scope of authority that could constitutionally be assigned to the Comptroller General or, specifically, whether the Constitution would permit the Comptroller General, as an arm of Congress, to take action affecting the rights or obligations of Executive Branch officials or private citizens.

Other cases have expressly recognized that, in the context of the Comptroller General's current review of bid protests, the authority of the Comptroller General is purely advisory and does not bind the Executive Branch. See Delta Data Systems Corp. v. Webster, No. 84-5356, slip op. at 8-9 (D.C. Cir. Sep. 21, 1984); Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1313 (D.C. Cir. 1971); Aero Corp. v. Department of the Navy, 540 F. Supp. 180, 206 (D.D.C. 1982); Simpson Electric Co. v. Seamans, 317 F. Supp. 684, 686 (D.D.C. 1970).

5/ In Buckley v. Valeo, the Court noted that the Comptroller General "is appointed by the President in conformity with the Appointments Clause." 424 U.S. at 128 n.165. This reference was not, however, an indication that the Comptroller General is authorized to perform executive responsibilities, but rather, simply responded to an argument made by Congress in Buckley that the Office of Comptroller General was precedent supporting Congress's asserted right to make certain types of appointments.

Indeed, the United States Court of Appeals for the District of Columbia Circuit has recently recognized that there "might be a constitutional impediment to such a binding effect. See INS v. Chadha, 103 S. Ct. 2764 (1983)." Delta Data Systems Corp. v. Webster, slip op. at 9 n.1.

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional role of the Comptroller General, it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, and he may not take actions that bind individuals and institutions outside the Legislative Branch. He may advise and assist Congress in reviewing the performance of the Executive Branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States. Our analysis of the bid protest provisions of the CICA is based upon these conclusions.

III

THE CONSTITUTIONALITY OF THE BID PROTEST PROVISIONS OF THE CICA

Given the foregoing constitutional principles, there are two provisions of the CICA that raise significant constitutional problems: (1) the provision requiring a procuring agency to stay a procurement pending resolution by the Comptroller General of a bid protest; and (2) the provision authorizing the Comptroller General to require a procuring agency to pay certain costs, including attorneys' fees and bid preparation costs.

A. The Stay Provision

Under the stay provision of the CICA, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision on a bid protest. As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest.

From a constitutional perspective, we find nothing improper in the requirement for a stay, in and of itself. Congress frequently requires Executive Branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so-called "report and wait" requirements were specifically recognized by the Supreme Court in Chadha as a constitutionally acceptable alternative to the legislative veto. See 103 S. Ct. at 2783.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. The CICA gives the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed. This authority amounts, in Chadha's words, to a power that has the "effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." See 103 S. Ct. at 2784. As a constitutional matter, there is very little difference between this power and the power of a legislative veto.

A similar issue was raised in American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982). In that case, the court of appeals considered the validity of a statute that required the Department of Housing and Urban Development to suspend any reorganization until it received approval from the House and Senate Committees on Appropriations. The court ruled that this provision could be interpreted simply as a form of legislative veto, but it also stated:

The provision can also be taken as granting the Appropriations Committees the power to lift a congressionally-imposed restriction on the use of appropriated funds. In this light, the directive is nothing more or less than a grant of legislative power to two congressional committees. It is plainly violative of article I, section 7, which prescribes the only method through which legislation may be enacted and which "restrict[s] the operation of the legislative power to those policies which meet the approval of three constituencies, or a super-majority of two."

697 F.2d at 306, citing Consumer Energy Council v. FERC, 673 F.2d 425, 464 (D.C. Cir. 1982), aff'd 103 S. Ct. 3556 (1983). Similarly, the grant to the Comptroller General of the power to lift the stay imposed under the CICA amounts to a grant of

legislative power to an arm of Congress. This grant is clearly inconsistent with the principles established by the Supreme Court in Chadha, which were accurately anticipated by the D. C. Circuit in Pierce.

A difficult problem is presented in this instance, however, by the question of the extent to which the unconstitutional provision is severable from the remainder of the CICA. In Chadha, the Court ruled that an unconstitutional provision is generally presumed to be severable. The Court outlined several guidelines with respect to evaluating this issue in a specific instance. First, the Court stated:

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not" Buckley v. Valeo, 424 U.S. 1, 108 . . . (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 . . . (1932).

INS v. Chadha, 103 S. Ct. at 2774. Thus, unless there are clear indications that Congress would have intended additional parts of a statute to fall because of the invalidity of a single provision, the invalid provision will be severed. Second, the Court stated that a severability clause is strong evidence that Congress did not intend that the entire statute or any other part of it would fall simply because another provision was unconstitutional. 103 S. Ct. at 2775. Finally, the Court stated that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.'" Champlin Refining Co. v. Corporation Comm'n, *supra*, 286 U.S. at 234." 103 S. Ct. at 2775. The severability issue must be analyzed in light of these principles.

The only aspect of the stay provision that is directly unconstitutional is the provision authorizing the Comptroller General to lift the stay by issuing his decision or finding that a particular protest is frivolous. If this provision alone were severed, the stay would remain in effect indefinitely because there would be no remaining statutory basis for terminating the stay. Although the statute could technically operate this way, as a practical matter this alternative would seem quite draconian because it would permit any bid protester effectively to cancel a procurement simply by filing a protest.

It is clear that Congress did not intend such a result when it adopted the CICA. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984).

Alternatively, the stay provisions could be interpreted to require a mandatory stay for a set period of time in order to give the Comptroller General an opportunity to reach a decision on the bid protest. This period of time might be set at 90 working days, which is the period of time established by the CICA as the standard time within which the Comptroller General should issue his decision on a bid protest.

We do not believe, however, that such a reworking of the statute would be consistent with Congress's intent. First, such a construction would involve essentially a redrafting of the stay provision rather than simple severance of the offending sections. Second, and more important, it would mean that any time a bid protest were filed, a procurement would automatically be delayed for 90 working days. Thus, any interested party who might be able to file a protest, however ill-founded, could prevent a procurement for a not insubstantial period of time.

We do not believe that Congress intended the bid protest process to be subject to such potential manipulation. 6/ In fact, Congress expressly included the provision granting the

6/ We are informed by representatives of the Department of Defense that there would be a significant question concerning the proper allocation of costs incurred by an otherwise successful bidder during any period in which a stay were in effect. If Congress desires to enact a bid-protest system in which frivolous protests stay the award of a contract for 90 days (or any other set period of time), thereby potentially increasing substantially the ultimate cost to the Government of a procurement because the original, successful bidder will have to pass on to the Government the costs incurred because of the delay, Congress may do so. We would not, however, assume an intent on the part of Congress to do so; if Congress intends to legislate such an arguably inefficient procurement system, we believe it should be required to do so expressly in order to provide for the political accountability that is built into our constitutional system.

Comptroller General the power to dismiss frivolous protests precisely in order to avoid this potential abuse. The conference report stated:

The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a solid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984). Given our conclusion that the provision permitting the Comptroller General to terminate the stay immediately in the case of a frivolous protest is unconstitutional, we do not believe that Congress would have intended for all contracts to be delayed for any set period of time simply upon the filing of a protest, regardless of the good faith of the protester or merit of the protest. Therefore, because the provisions permitting the Comptroller General to terminate the stay must be severed from the statute, we believe that the entire stay provision must be stricken as well. 7/

This result is consistent with the approach taken by the United States Court of Appeals for the District of Columbia Circuit in American Federation of Government Employees v. Pierce. In that case, as previously discussed, the court declared unconstitutional a provision that required a stay of any reorganization plan within HUD until two congressional committees had given specific approval. The court recognized that the only directly unconstitutional aspect of this statute was the section that gave the congressional committees the power to terminate the stay. 697 F.2d at 307. Although the court could have severed that provision alone from the statute and left the stay provision in effect, it determined that "the prohibition on HUD reorganization [was] 'inextricably bound' to the invalid committee approval device." Id. (citation omitted). In the present instance, the two provisions seem equally inextricably bound, and we believe that Congress would not have enacted the stay provision "in the absence of the invalidated provision." See Consumer Energy Council v. FERC, 673 F.2d at 442.

7/ We have no doubt that, under the severability principles set forth above, the stay provision may be severed. The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated.

B. The Provision for Awarding Attorneys' Fees and Bid Preparation Costs

The provision permitting the Comptroller General to award costs, including attorneys' fees and bid preparation costs, to a prevailing protester, and which purports to require federal agencies to pay such awards "promptly," 31 U.S.C. § 3554(c)(2), suffers from a constitutional infirmity similar to the one that afflicts the stay provision. By purporting to vest in the Comptroller General the power to award damages against an Executive Branch agency, Congress has attempted to give its agent the authority to alter "the legal rights, duties and relations of persons . . . outside the legislative branch." 103 S. Ct. at 2784. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise judicial authority than it may exercise executive authority. See INS v. Chadha, 103 S. Ct. at 2788 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, see Humphrey's Executor v. United States, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

Based on our discussion of the law of severability in Part III.A. above, we believe that the damages provision is clearly severable from the remainder of the CICA. The remainder of the Act is unrelated to the damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute.

We wish to emphasize that we do not question the validity of the remainder of the CICA, and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain Executive Branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch.

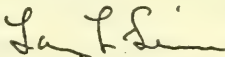
IV

CONCLUSION

In summary, we believe that the stay provisions of the CICA, now in 31 U.S.C. § 3553(c) and (d), are unconstitutional and should be severed in their entirety from the remainder of the Act. In addition, the damages provision contained in 31 U.S.C. § 3554(c) is similarly unconstitutional and should be severed from the rest of the CICA. Because these provisions are unconstitutional, they can neither bind the Executive Branch nor provide authority for Executive Branch actions. Thus, the Executive Branch should take no action, including the issuance of regulations, based upon these invalid provisions.

We recommend that Executive Branch agencies implement these legal conclusions in the following manner. First, with respect to the stay provisions, all executive agencies should proceed with the procurement process as though no stay provision were contained in the CICA. We recognize that, under the Federal Acquisition Regulation, executive agencies have voluntarily agreed to stay procurements pending the resolution of bid protests in certain circumstances. See 48 C.F.R. § 14.407-8(b)(4). Executive agencies may continue to comply with these and other applicable regulations. These regulations may not, however, be based upon the invalid authority of the stay requirements of the CICA.

With respect to the damages provision contained in 31 U.S.C. § 3554(c), executive agencies should under no circumstances comply with awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General. We would further recommend that executive agencies not respond to the Comptroller General on the merits of any application for a damage award except to state that the Executive Branch regards the damages provision as unconstitutional.



Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel

4. December 17, 1984, OMB Bulletin No. 85-8, "Procedures Governing Implementation of Certain Unconstitutional Provisions of the Competition in Contracting Act of 1984."



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

December 17, 1984

BULLETIN NO. 85-8

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Procedures Governing Implementation of Certain Unconstitutional Provisions of the Competition in Contracting Act of 1984

1. Summary. The Department of Justice has concluded that two provisions of the Competition in Contracting Act of 1984 are unconstitutional because they purport to authorize the Comptroller General to exercise Executive authority in violation of the principle of Separation of Powers. Pending judicial resolution of the matter, agencies which exercise procurement authority will hereafter be required to conduct their contracting authority in conformance with the Department's legal advice.

2. Background. On July 18, 1984, the President signed the Competition in Contracting Act, enacted as part of the Deficit Reduction Act of 1984, Public Law No. 98-369, 98 Stat. 494. At the time he signed the bill, the President issued a statement questioning the constitutionality of several provisions of the Act which ostensibly authorized the Comptroller General to bind Executive Branch agencies concerning certain aspects of the bid protest process. The President further requested that the Attorney General advise Executive agencies how to comply with the Act in a manner consistent with the Constitution.

On October 17, 1984, the Department responded to the President's request by issuing an opinion which concluded that several provisions added by Section 2741 of the Act were unconstitutional:

- o 31 U.S.C. 3553(c) and (d), which require a procuring agency to suspend or "stay" a procurement if a bid protest is timely filed and purport to authorize the Comptroller General to lift this "stay" of the procurement by issuing his decision on the bid protest.
- o 31 U.S.C. 3554(c), which purports to authorize the Comptroller General to make binding awards of attorneys' fees and bid preparation costs to successful bid protestors.

The Department concluded that the Comptroller General, as a Legislative Branch official, could not exercise these Executive Branch authorities consistent with the Constitution, as recently interpreted by the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983). The Department therefore concluded that these three sections must be stricken from the Act. (A copy of the Department's letters to the Speaker of the House and the Vice President, as well as its formal opinion on the subject, are attached to this Bulletin.)

The Department did not question the validity of the remainder of the Act, including specifically its grant of authority to the Comptroller General to review bid protests. The Department concluded that the Comptroller General could properly continue to review and issue opinions with respect to bid protests, but that these decisions must be regarded as advisory only and not binding on the Executive Branch.

3. **Action Requirements.** The following principles are to be observed by Executive agencies with respect to the unconstitutional provisions of the Act:

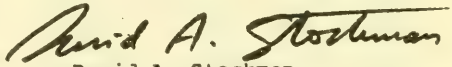
- o Agencies shall take no action, including the issuance of regulations, based upon the invalid provisions.
- o With respect to the "stay" provision, agencies shall proceed with the procurement process as though no such provision were contained in the Act. Pursuant to the provisions of the Federal Acquisition Regulations, the agency may voluntarily agree to stay procurements pending the resolution of bid protests, but the grant of such a stay must be based upon other valid authority and may not be based upon the invalid stay provisions of the Act.
- o Agencies shall comply with the provisions of 31 U.S.C. 3553(b) concerning the submission of reports to the Comptroller General on protested procurements.
- o With respect to the damages provision of the Act, agencies shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General.
- o Agencies shall comply with 31 U.S.C. 3554(e) concerning submission of reports to the Comptroller General on unaccommodated recommendations.

4. Report Requirements.

- o Each agency should report to its OMB budget examiner and the Office of Legal Counsel any declarations of awards issued by the Comptroller General.
- o If the agency is sued by any bid protestor or other person who challenges its failure to comply with the unconstitutional provisions of the Act, the agency shall immediately notify the Department of Justice.

5. General Provision. Questions concerning these implementation procedures should be directed to the Office of Federal Procurement Policy through your OMB budget examiner. Any questions concerning the interpretation of the unconstitutional provisions should be directed to the Office of Legal Counsel of the Department of Justice.

6. Sunset Date. This bulletin will remain in effect until superseded or rescinded.



David A. Stockman
Director

5. February 7, 1985, study by the Congressional Research Service, Library of Congress, entitled "State Constitutional Provisions Establishing Auditors or Controllers."



**Congressional Research Service
The Library of Congress**

Washington, D.C. 20540

**STATE CONSTITUTIONAL PROVISIONS ESTABLISHING
AUDITORS OR CONTROLLERS**

**Duncan Hollomon
Legislative Research Assistant
American Law Division
February 7, 1985**

EXECUTIVE SUMMARY

Our research indicates that every state has made some provision for the auditor or controller. In most instances, the office of the state auditor or controller is established by constitutional provision as one of the constituent offices of the executive branch. In a smaller number of states, the office is considered a part of the legislative branch. The person to fill the office is chosen either by general election or by the legislature. Seven states apparently have no constitutional provision and establish such an office by statute.

In most states the duties of the auditor or controller are broadly defined. Virginia provides a typical instance:

An Auditor of Public Accounts shall be elected by the joint vote of the two houses of the General Assembly for the term of four years. His powers and duties shall be prescribed by law. Virginia Const., Art. IV, § 8.

Some state constitutions (eg. Maryland) have more explicit definitions of the duties of the officer, others establish the specific responsibilities by statute. These duties may include: conducting a post audit of the financial transactions of the state, reporting to the legislature the revenue and expenditures of the state, adjusting and settling accounts, superintending and enforcing the collection of taxes and revenues, certification of the accuracy of financial statements issued by other accounting officers, ordering payment into and out of the funds held by the Treasurer, investigating the expenditure of state funds, preparing plans for the improvement of management of revenue, and making other periodic reports to the legislature.

Arizona

No constitutional provision could be found

Office of Post-auditor created by Laws 1950, 1st S.S., Ch. 28, §§ 1 et seq., 5 and 6. Held constitutional in Lockwood v. Jordan, 72 Ariz. 77, 231 P.2d 428 (1951), codified at Ariz. Rev. Stat. § 41-1279, et seq.

Arkansas

Article VI, § 26

There shall be elected by the qualified voters of this State an Auditor and Treasurer for this State, who shall hold their offices for the term of two years

California

Article V, § 17

§ 17. Election of other constitutional officers

Section 17. A Secretary of State, a Controller, a Treasurer, an Attorney General, and a Surveyor General shall be elected at the same time and places, and in the same manner as the Governor and Lieutenant Governor, and their terms of office shall be the same as that of the Governor.

Colorado

Article IV, § 21

Elected Auditor of State -- powers and duties Repealed November 5, 1974. See Laws 1974, p. 447, Colo. Rev. Stat. § 2-3-101.

Connecticut

Article IV, § 24

The comptroller shall adjust and settle all public accounts and demands, except grants and orders of the general assembly. He shall prescribe the mode of keeping and rendering all public accounts. He shall, ex officio, be one of the auditors of the accounts of the treasurer. The general assembly may assign to him other duties in relation to his office, and to that of the treasurer, and shall prescribe the manner in which his duties are to be performed.

Delaware

Article III, § 21

The terms of office of Attorney General and Insurance Commissioner shall be four years; and the terms of office of the State Treasurer and Auditor of Accounts shall be two years. These officers shall be chosen by the qualified electors of the State at general elections and by commission by the Governor. (Previous constitutional provisions available.)

Florida

Article III, § 2

. . . . The legislature shall appoint an auditor to serve at its pleasure who shall audit public records and perform related duties as prescribed by law or concurrent resolution.

Georgia

Article III, § 9(c)

The General Assembly shall by general law provide for the regulation and management of the finance and fiscal administration of the State.

Hawaii

Article VI, § 6

The legislature, by a majority vote of each house in joint session, shall appoint an auditor who shall serve for a period of eight years and thereafter until a successor shall have been appointed. The legislature, by a two-thirds vote of the members in joint session, may remove the auditor from office at any time for cause. It shall be the duty of the auditor to conduct post audits of all transactions and of all accounts kept by or for all departments, offices, agencies of the and its political sub-divisions, to certify to the accuracy of all financial statements issued by the respective accounting officers and to report his findings and recommendations to the governor and to the legislature at such times as shall be prescribed by law. He shall also make such additional reports and conduct such other investigations as may be directed by the legislature.

Idaho

Article IV, §§ 1, 2,
and 17

§ 1. The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction, each of whom shall hold his office for four years They shall perform such duties as are prescribed by this Constitution and as may be prescribed by law.

§ 2. The officers named in section 1 of this article shall be elected by the qualified electors of the state at the time and places of voting for members of the legislature

§ 17. An account shall be kept by the officers of the executive department and of all public institutions of the state of all monies received by them severally, from all sources, and for every service performed, and of all moneys dispersed to them severally, and a semi-annual report thereof shall be made to the governor, under oath. They shall also, at least twenty days preceeding each regular session of the legislature, make full and complete reports of their official transactions to the governor, who shall transmit the same to the legislature.

Illinois

Article V, § 17

§ 17. Comptroller -- Duties

The Comptroller, in accordance with law, shall maintain the State's central fiscal accounts, and order payments into and out of the funds held by the Treasurer.

Indiana

Article VI, § 1

There shall be elected, by the voters of the State, a Secretary, an auditor and a Treasurer of State, who shall, severally, hold their offices for four years. They shall perform such duties as may be enjoined by law

Iowa

Article IV, § 22

A Secretary of State, Auditor of State and Treasurer of State shall be elected by the qualified electors, who shall continue in office two years, and until their successors are elected and qualified, and perform such duties as may be required by law.

Kansas

No constitutional provision could be found.
See Kan. Stat. Ann. § 46-1101, et seq.

Kentucky

§§ 91, 93

§ 91. A treasurer, Auditor of Public Accounts, Register of the Land Office, Commissioner of Agriculture, Labor and Statistics, Secretary of State, Attorney-General and Superintendent of Public Instruction, shall be elected by the qualified voters of the State at the same time the governor is elected, for the term of four years The duties of these officers shall be as such as may be prescribed by law, and the Secretary of State shall keep a fair register of attest to all the official acts of the Governor, and shall, when required, lay the same and all papers, minutes and vouchers relative thereto before either House of the General Assembly.

Louisiana

Art. III, § 11

Section 11. There shall be a legislative auditor responsible solely to the legislature. He shall serve as a fiscal advisor to it and shall perform the duties and functions provided by law related to auditing fiscal records of the state, its agencies, and political subdivisions. He shall be elected by the concurrence of a majority of the elected members of each house and may be removed by the concurrence of two-thirds of the elected members of each house.

Maine

Article III, § 4

A post audit of all accounts and other financial records of the Legislature and the Executive Department of the Governor except the Governor's Expense Account, shall be performed at least once every two years by independent certified public accountants designated by the governor.

Such audit report shall be filed with the legislature and with the State library.

Maryland

Article VI, §§ 1, 2

There shall be a Treasury Department, consisting of a Comptroller chosen by the qualified electors of the State, who shall receive such salary as may be fixed by law; and a Treasurer, to be appointed on joint ballot by the two Houses of the Legislature at each regular session in which begins the term of the Governor, who shall receive such salary as may be fixed by law. The terms of office of the Comptroller and Treasurer shall be for four years, and until their successors shall qualify; and neither of the officers shall be allowed, or receive any fees, commissions or prerequisite of any kind in addition to his salary for the performance of any duty or services whatsoever. In case of a vacancy in the office of the Comptroller by death or otherwise, the Governor, by and with the advice and consent of the Senate, shall fill such vacancy by appointment, to continue until another election and until the qualification of the successor. In case of vacancy in the office of the Treasurer by death or otherwise, the Deputy Treasurer shall act as Treasurer until the next regular or extraordinary session of the Legislature following the creation of the vacancy, whereupon the Legislature shall choose a successor to serve for the duration of the unexpired term of office. The Comptroller and the Treasurer shall keep their offices at the seat of government, and shall take such oaths and enter into such bonds for the faithful discharge of their duties as are now or may hereafter be prescribed by law. (1922, ch. 141, ratified Nov. 7, 1922; 1966, ch. 428, ratified Nov. 8, 1966; 1976, ch. 640, ratified Nov. 2, 1976; 1977, ch. 681, ratified Nov. 7, 1978.)

Section 2. Powers and duties of Comptroller.

The Comptroller shall have the general superintendence of the fiscal affairs of the State; he shall digest and prepare plans for the improvement and management of the revenue, and for the support of the public credit; prepare and report estimates of the revenue and expenditures of the State; superintendent and

enforce the prompt collection of all taxes and revenues; adjust and settle, on terms prescribed by law, with delinquent collectors and receivers of taxes and State revenue; preserve all public accounts; and decide on the forms of keeping and stating accounts. He, or such of his deputies as may be authorized to do so by the Legislature, shall grant, under regulations prescribed by Law, all warrants for money to be paid out of the Treasury, in pursuance of appropriations by law, and countersign all checks drawn by the Treasurer upon any bank or banks in which the moneys of the State, may, from time to time, be deposited. He shall prescribe the formalities of the transfer of stock, or other evidence of the State debt, and countersign the same, without which such evidence shall not be valid; he shall make to the General Assembly full reports of all his proceedings, and of the state of the Treasury Department within ten days after the commencement of each session; and perform such other duties as shall be prescribed by law. (1929, ch. 133, ratified Nov. 4, 1930.)

Massachusetts

Amendments, Article XVII

Election of secretary, treasurer, auditor and attorney-general; vacancies

Art. XVII. The secretary, treasurer and receiver-general, auditor, and attorney-general, shall be chosen [annually,] on the day in November prescribed for the choice of governor; and each person then chosen as such, duly qualified in other respects, shall hold his office for the term of [one year] from the third Wednesday in January next thereafter, and until another is chosen and qualified in his stead. The qualification of the voters, the manner of the election, the return of the votes, and the declaration of the election, shall be such as are required in the election of governor. In case of a failure to elect either of said officers on the day in November aforesaid, or in case the decease, in the meantime, of the person elected as such, such officer shall be chosen on or before the third Wednesday in January next thereafter, from the people at large, by joint ballot of the senators and representatives, in one room; and in case the office of secretary, or treasurer and receiver-general, or auditor, or attorney-general, shall become vacant, from any cause,

during an annual or special session of the general court, such vacancy shall in like manner be filled by choice from the people at large; but if such vacancy shall occur at any other time, it shall be supplied by the governor by appointment, with the advice and consent of the council. The person so chosen or appointed, duly qualified in other respects, shall hold his office until his successor is chosen and duly qualified in his stead. In case any person chosen or appointed to either of the offices aforesaid, shall neglect, for the space of ten days after he could otherwise enter upon his duties, to qualify himself in all respects to enter the discharge of such duties, the office to which he has been elected or appointed shall be deemed vacant. No person shall be eligible to either of said offices unless he shall have been an inhabitant of this commonwealth five years next preceding his election or appointment.

Michigan

Article IV, § 53

§ 53. Auditor general; appointment, qualifications, terms, removal, post audits

Sec. 53. The legislature by a majority vote of the members elected to and serving in each house, shall appoint an auditor general, who shall be a certified public accountant licensed to practice in this state, to serve for a term of eight years. He shall be ineligible for appointment or election to any other public office in this state from which compensation is derived while serving as auditor general and for two years following the termination of his service. He may be removed for cause at any time by a two-thirds vote of the members elected to and serving in each house. The auditor general shall conduct post audits of financial transactions and accounts of the state and of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state established by this constitution or by law, and performance post audits thereof.

Independent investigations; reports

The auditor general upon direction by the legislature may employ independent accounting firms or legal counsel and may make investigations pertinent to the conduct of audits. He shall report annually to the legislature and to the governor and at such other times as he deems necessary or as required by the legislature. He shall be assigned no duties other than those specified in this section.

Minnesota

Article V, § 1

§ 1. Executive officers

Section 1. The executive department consists of a governor, lieutenant governor, secretary of state, auditor, treasurer and attorney general, who shall be chosen by the electors of the state. The governor and lieutenant governor shall be chosen jointly by a single vote applying to both offices in a manner prescribed by law.

Mississippi

Article V, § 134

Section 134. A State Treasurer and an Auditor of Public Accounts shall be elected as herein provided, who shall hold their office for the term of four (4) years, and shall possess the same qualifications as required for the Secretary of State. They shall receive such compensation as may be provided by law. Said treasurer shall be ineligible to immediately succeed himself in office.

Missouri

Article IV, §§ 12, 13

§ 12. Executive department -- definition and composition -- assignment of agencies to departments

Section 12. The executive department shall consist of all state elective and appointive officials and employees except the officials and employees of the legislative and judicial departments. In addition to the governor and lieutenant governor there shall be a state auditor, secretary of state, attorney general,

a state treasurer and a department of revenue, department of education, department of highways, department of conservation, department of agriculture and such additional departments, not exceeding five in number, as may hereafter be established by law. Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by the governor to the department to which their respective powers and duties are germane.

§ 13. State auditor -- qualifications and duties -- limitation on duties

Section 13. The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds.

Montana

Article VI, § 4

Section 1. Officers. (1) The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor.

(2) Each holds office for a term of four years which begins on the first Monday of January next succeeding election, and until a successor is elected and qualified.

(3) Each shall reside at the seat of government, there keep the public records of his office, and perform such other duties as are provided in this constitution and by law.

Section 2. Election. (1) The governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor shall be elected by the qualified electors at a general election provided by law. (2) Each candidate for governor shall file jointly with a candidate for lieutenant governor in primary elections, or so otherwise comply with nomination procedures provided by law that the offices of governor and lieutenant governor are voted upon together in primary and general elections.

Section 4, Duties

The superintendent of public instruction and the auditor shall have such duties as are provided by law.

Nebraska

Article IV, § 1

Section 1. Executive departments; officers; when elected; terms; eligibility; books to be kept at seat of government; residence of officers; heads of departments; appointments. The executive officers of the state shall be the Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Treasurer, Attorney General, and the heads of such other executive departments as set forth herein or as may be established by law. The Legislature may provide for the placing of the above named officers as heads over such departments of government as it may by law establish.

The Governor, Lieutenant Governor, Attorney-General, Secretary of State, Auditor of Public Accounts and the Treasurer shall be chosen at the general election held in November, 1974, and in each alternate even-numbered year thereafter, for a term of four years and until their successors shall be elected and qualified. In the general election one vote shall be cast jointly for the candidates for Governor and Lieutenant Governor nominated by the same party. The Governor shall be ineligible to the office of Governor for four years next after the expiration of two consecutive terms for which he was elected. The records, books, and papers of all executive officers shall be kept at the seat of government, and such

officers, excepting the Lieutenant Governor and members of boards and commissions when the board or commission is the head of executive department, shall reside there during their respective terms of office. Officers in the executive department of the state shall perform such duties as may be provided by law.

Nevada

No constitutional provision could be found.
See Nev. Rev. Stat. §§ 218.740 et seq.
"Legislative Auditor"

New Hampshire

No constitutional provision could be found.
See N.H. Rev. Stat. Ann. § 14:30, et seq.

New Jersey

Article VII, § 1, ¶ 6

6. State Auditor; appointment; term; duties
6. The State Auditor shall be appointed by the Senate and General Assembly in joint meeting for a term of five years and until his successor shall be appointed and qualify. It shall be his duty to conduct post-audits of all transactions and accounts kept by or for all departments, offices and agencies of the State government, to report to the Legislature or to any committee thereof as shall be required by law, and to perform such other similar or related duties as shall, from time to time, be required of him by law.

New Mexico

Article V, § 1

Section 1. [Composition of department; terms of office of members; residing and maintaining records at seat of government.]

The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and commissioner of public lands, who shall, unless otherwise provided in the constitution of New Mexico, be elected for the term of four years beginning on the first day of January next after their election. The governor and lieutenant governor shall be elected jointly by the casting by each voter of a single vote applicable to both offices.

Such officers shall, after having served one term, be ineligible to hold any state office until one full term has intervened, except that the lieutenant governor may be eligible to hold the office of the governor.

The officers of the executive department, except the lieutenant governor, shall during their terms of office, reside and keep the public records, books, papers and seals of office at the seat of government.

New York

Article V, § 1

§ 1. [Comptroller and attorney-general, election, qualifications and duties; payment of state moneys without audit void]

The comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term, and shall possess the qualifications provided in section 2 of article IV. The legislature shall provide for filling vacancies in the office of comptroller and of attorney-general. No election of a comptroller or an attorney-general shall be had except at the time of electing a governor. The comptroller shall be required: (1) To audit all vouchers before payment and all official accounts; (2) to audit the accrual and collection of all revenues and receipts; and (3) to prescribe such methods of accounting as are necessary for the performance of the foregoing duties. The payment of any money of the state, or of any money under its control, or the refund of any money paid to the state, except upon audit by the comptroller, shall be void, and may be restrained upon the suit of any taxpayer with the consent of the supreme court in appellate division on notice to the attorney-general. In such respect the legislature shall define his powers and duties and may also assign to him: (1) supervision of the accounts of any political subdivision of the state; and (2) powers and duties pertaining to or connected with the assessment and taxation of real estate, including determination of ratios which the assessed valuation of taxable real property bears to the full valuation thereof, but not including any of those powers and duties reserved to officers of a county, city, town or village by virtue of sections

seven and eight of article nine of this constitution. The legislature shall assign to him no administrative duties, excepting such as may be incidental to the performance of these functions, any other provision of this constitution to the contrary notwithstanding.

North Carolina

Article III, § 7

Section 7. Other elective officers.

(1) Officers. A Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance shall be elected by the qualified voters of the State in 1972 and every four years thereafter, at the same time and places as members of the General Assembly are elected. Their term of office shall be four years and shall commence on the first day of January next after their election and continue until their successors are elected and qualified.

(2) Duties. Their respective duties shall be prescribed by law

North Dakota

Article V, § 12

Section 12. There shall be chosen by the qualified electors of the state at the times and places of choosing members of the legislative assembly, a secretary of state, auditor, treasurer, superintendent of public instruction, commissioner of insurance, an attorney general, a commissioner of agriculture and labor, and a tax commissioner, who shall have attained the age of twenty-five years and shall have the qualifications of state electors. They shall severally hold their offices at the seat of government for the term of four years beginning with the year 1965, and until their successors are elected and duly qualified; but no person shall be eligible for the office of treasurer for more than two consecutive terms.

Ohio

Article III, § 1

§ 1. Executive department.

The executive department shall consist of governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected on the first Tuesday after the first Monday in November, by the electors of the state, and at the places of voting for members of the general assembly. (As amended October 13, 1885; 82 v. 446.)

Oklahoma

Article VI, §§ 1, 19

§ 1. Executive officers enumerated -- Offices and records -- Duties

A. The executive authority of the state shall be vested in a Governor, Lieutenant Governor, Secretary of State, State Auditor and Inspector, Attorney General, State Treasurer, Superintendent of Public Instruction, Chief Mine Inspector, Commissioner of Insurance and other officers provided by law and this Constitution, each of whom shall keep his office and public records, books and papers at the seat of government, and shall perform such duties as may be designated in this Constitution or prescribed by law.

STATE AUDITOR AND INSPECTOR

§ 19. Qualifications, powers and duties

The State Auditor and Inspector must have had at least three years' experience as an expert accountant; his duties shall be, without notice to such treasurer, to examine the state and all county treasurers' books, accounts and cash on hand or in bank at least twice each year, and publish his report as to every such treasurer once each year. For the purpose of such examination he shall take complete possession of such treasurer's office. He shall also prescribe a uniform system of bookkeeping for the use of all treasurers. The State Auditor and Inspector shall perform such other duties and have such other powers as may be prescribed by law.

Oregon

Article VI, § 2

Section 2. Duties of Secretary of State. The Secretary of State shall keep a fair record of the official acts of the Legislative Assembly, and Executive Department of the State; and shall when required lay the same, and all matters relative thereto before either branch of the Legislative Assembly. He shall be by virtue of his office, Auditor of public Accounts, and shall perform such other duties as shall be assigned him by law. -- (emphasis added)

Pennsylvania

Article IV, §§ 1, 18

§ 1. Executive department

The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and Superintendent of Public Instruction and such other officers as the General Assembly may from time to time prescribe.

§ 18. Terms of office of Auditor General and State Treasurer; number of terms; eligibility of State Treasurer to become Auditor General

The terms of the Auditor General and of the State Treasurer shall each be four years from the third Tuesday of January next ensuing his election. They shall be chosen by the qualified electors of the Commonwealth at general elections but shall not be eligible to serve continuously for more than two successive terms. The State Treasurer shall not be eligible to the office of Auditor General until four years after he has been State Treasurer.

Rhode Island

No constitutional provision could be found.
See R.I. Gen. Laws § 22-13-1 et seq.

South Carolina

No constitutional provision could be found.
See S.C. Code § 11-7-10 et seq.

South Dakota

Article IV, § 7

§ 7. Other executive officers -- Powers and duties.

There shall be chosen by the qualified electors of the state at the general election of the Governor and every four years thereafter the following constitutional officers: attorney general, secretary of state, auditor, treasurer, and commissioner of school and public lands, who shall severally hold their offices for a term of four years.

Tennessee

Article VII, § 3

Section 3. Treasurer and comptroller. -- There shall be a Treasurer or Treasurers and a Comptroller of the Treasury appointed for the State, by the joint vote of both houses of the General Assembly, who shall hold their offices for two years.

Texas

Article IV, §§ 1, 23

§ 1. Officers constituting the Executive Department

Sec. 1. The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, and Attorney General.

§ 23. Comptroller of Public Accounts: Treasurer; Commissioner of General Land Office; elected statutory State officers; term: salary, fees, costs and perquisites

Sec. 23. The comptroller of Public Accounts, the Treasurer, the Commissioner of the General Land Office, and any statutory State officer who is elected by the electorate of Texas at large, unless a term of office is otherwise specifically provided in this Constitution, shall each hold office for the term of four years and until his successor is qualified. The four-year term applies to these officers who are elected at the general election in 1974 or thereafter. Each shall receive an annual salary in an amount to be fixed by the Legislature; reside at the Capital of the State during his continuance in office, and perform such duties as are or may be required by law. They and the

Secretary of State shall not receive to their own use any fees, costs or perquisite, of office. All fees that may be payable by law for any service performed by any officer specified in this section or in his office, shall be paid, when received, into the State Treasury.

Utah

Article VII, § 17

Section 17. [Duties of auditor and treasurer.]

The Auditor shall be Auditor of Public Accounts, and the Treasurer shall be the custodian of public moneys, and each shall perform such other duties as may be provided by law.

Vermont

Chapter II, § 26

[§ 26. Treasurer's accounts]

Section 26. The Treasurer's accounts shall be annually audited, and a fair state thereof laid before the General Assembly at its biennial session in January.

Virginia

Article IV, § 18

§ 18. Auditor of Public Accounts. -- An Auditor of Public Accounts shall be elected by the joint vote of the two houses of the General Assembly for the term of four years. His powers and duties shall be prescribed by law.

Washington

Article III, §§ 1, 20

§ 1. Executive Department. The executive department shall consist of a governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands,

who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.

§ 20. State Auditor, Duties and Salary. The auditor shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith as may be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

West Virginia

Article VII, §§ 1, 2

Executive Department

§ 1. The executive department shall consists of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be, ex-officio, reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election. They shall reside at the seat of government during their terms of office, keep there the public records, books and papers pertaining to their respective offices and shall perform such duties as may be prescribed by law.

Election

§ 2. An election for governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general shall be held at such times and places as may be prescribed by law.

Wisconsin

Article IV, § 33

§ 33. Auditing state accounts

Section 33. The legislature shall provide for the auditing of state accounts and may establish such offices and prescribe such duties for the same as it shall deem necessary.

Wyoming

Article IV, §§ 11, 14

§ 14. State examiner.

The legislature shall provide for a state examiner, who shall be appointed by the governor and confirmed by the senate. His duty shall be to examine the accounts of state treasurer, supreme court clerks, district court clerks, and all county treasurers, and treasurers of such other public institutions as the law may require, and shall perform such other duties as the legislature may prescribe. He shall report at least once a year, and oftener if required, to such officers as are designated by the legislature. His compensation shall be fixed by law.

§ 11. State officers; election; qualifications; terms.

There shall be chosen by the qualified electors of the state at the times and places of choosing members of the legislature, a secretary of state, auditor, treasurer, and superintendent of public instruction, who shall have attained the age of twenty-five years respectively, shall be citizens of the United States, and shall have the qualifications of state electors. They shall severally hold their offices at the seat of government, for the term of four (4) years and until their successors are elected and duly qualified, but no person shall be eligible for the office of treasurer for four (4) years next after the expiration of the term for which he was elected. The legislature may provide for such other state officers as are deemed necessary.

Duncan Hollomon
Legislative Research Assistant
American Law Division
February 7, 1985

APPENDIX B.—ADDITIONAL STATEMENTS AND LETTERS FOR THE RECORD

1. Statement of Senator William S. Cohen and Senator Carl Levin

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT
WASHINGTON, D.C. 20510

SUBCOMMITTEE
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SUSAN M. COLLINS, STAFF DIRECTOR

STATEMENT OF
SENATOR WILLIAM S. COHEN
AND
SENATOR CARL LEVIN

Before The
HOUSE GOVERNMENT OPERATIONS COMMITTEE

Hearing on
CONSTITUTIONALITY OF THE GAO'S BID PROTEST FUNCTION

February 28, 1985

Mr. Chairman, we want to commend you and Representative Horton for holding these hearings to oversee the implementation of the Competition in Contracting Act (CICA), P.L. 98-369.

As chairman and ranking minority member of the Governmental Affairs Subcommittee on Oversight of Government Management, we have worked over the past five years to remedy what we consider to be a fundamental and pervasive problem in government contracting -- the lack of competition. CICA, which

was signed into law last July as part of the Deficit Reduction Act, represents the culmination of our efforts to increase competition in contracting and to restrict the use of unnecessary sole-source contracting.

Enactment, however, is only the first step toward remedying the federal government's excessive reliance on sole-source contracting. The second, and equally important, step is to ensure that the implementing regulations accurately reflect the statutory requirements, and that the procuring agencies comply with these requirements.

With the assistance of the General Accounting Office, we found that the proposed CICA changes to the Federal Acquisition Regulation generally reflect the statute, except in certain problem areas. In these areas, which were detailed in a December 12, 1984, letter to the three regulatory agencies, we found that the proposed regulations either did not comport with the statutory requirements or did not provide sufficient guidance. The discrepancies between legislative intent and executive implementation resulted, in almost all cases, from an apparent disregard for the Conference Report that accompanies CICA (98-861), which gives direction to those officials responsible for issuing the regulations.

The most serious implementation problem involves the enforcement of CICA's bid protest provisions. As you are well aware, the Justice Department has directed the agencies

not to comply with certain statutory provisions that the Attorney General believes to be unconstitutional because they purportedly authorize the Comptroller General to exercise Executive authority in violation of the principle of separation of powers. The provisions in dispute include the triggering of contract award and performance stays when protests are filed (31 U.S.C. §3553(c) and (d)), and the authorization for the Comptroller General to award costs to successful protestors (31 U.S.C. §3554(c)).

At issue here are two constitutional questions. First, do CICA's bid protest provisions, which codify and strengthen the Comptroller General's role in resolving bid protests, violate the principle of separation of powers? And second, does the Attorney General's recommendation to the agencies to ignore these statutory provisions enacted by the Congress and signed into law by the President violate this same separation-of-powers principle?

Concerning the first question, the Justice Department bases its separation-of-powers argument primarily on the assumption that the Comptroller General is a legislative officer. While it's true that the GAO serves as an arm of the Congress, the Department fails to recognize that the Comptroller General has executive responsibilities as well: "[t]he Comptroller General has also a second status as the chief accounting officer of the Government. ...This is an executive function and in performing it the Comptroller General acts as a member of the

Executive Branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive duties, ..." United States v. Stewart, 264 F. Supp. 89, 99 (D.D.C.), aff'd, 339 F. 2d 753 (D.C. Cir. 1964).

The Senate Legal Counsel points out, moreover, that in considering this separation-of-powers issue, the Supreme Court looks to how the head of the agency is appointed. In Buckley v. Valeo, 424 U.S. 1(1976), quoting Humphrey's Executor v. United States, 295 U.S. 602, 628 (1938), the Court held that the Appointments Clause of the Constitution "controls the appointment of the members of a typical administrative agency even though its functions... may be 'predominantly quasi-judicial and quasi-legislative' rather than executive." Because the Comptroller General is "appointed by the President, by and with the advice and consent of the Senate," he properly exercises authority as an officer of the United States.

We have asked several experts to review the arguments advanced by the Department of Justice regarding the constitutionality of the bid protest provisions of CICA. The Senate Legal Counsel, the General Counsel to the Clerk of the House of Representatives, the American Law Division of the Congressional Research Service, and the General Accounting Office all agree that CICA's bid protest provisions are constitutional.

We would be happy to provide copies of these analyses for the hearing record.

The second question, then, is whether the Justice Department itself is violating the principle of separation of powers by recommending that the agencies should not comply with those bid protest provisions. Absent a court ruling, we strongly believe that a unilateral decision by the Executive Branch to refuse to enforce a statute constitutes a usurpation of the proper role of the judiciary and a failure by the President to meet his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. Const., Art. 11, Sec. 3.

The Justice Department's action is inconsistent with its own historical understanding of the obligation of Executive Branch agencies to enforce those statutes that the Department believes to be unconstitutional. The Department has previously recognized its responsibility to enforce statutes, even while disputing their constitutionality in court.

In the controversy over the constitutionality of the legislative veto, for example, the Executive Branch had always respected the exercise of a legislative veto, notwithstanding the Department's view that legislative vetoes were unconstitutional. In Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983), the Solicitor General explicitly stated that, "[u]ntil and unless the court of appeals entered a decision holding the statute unconstitutional, INS intended to enforce the law."

The Solicitor General explained that the alternative approach of "ignoring a resolution of disapproval passed by one House of Congress and to cancel deportation proceedings...would be inconsistent with the accepted view that constitutional questions arising in the administration of a statute should, if possible, be resolved by the courts, not by the administrative agency itself." The Solicitor General concluded that the enforcement of the statute by the Executive Branch, despite its refusal to defend the statute once judicial proceedings were initiated, "was not merely permissible under the circumstances, but was a responsible and wholly appropriate response to the situation."

Former Attorney General Benjamin R. Civiletti stated, while in office, "that if Executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system." Mr. Civiletti went on to say that "the available evidence concerning the intentions of the Framers lends no specific support to the proposition that the Executive has a constitutional privilege to disregard statutes that are deemed by it to be inconsistent with the Constitution. The Framers gave the President a veto for the purpose, among others, of enabling him to defend his constitutional position" (testimony before the Senate Judiciary Committee, July 1980).

Mr. Civiletti's statements clearly contravene his successor's justification for recommending that agencies should not comply with CICA's bid protest provisions. In a recent letter, William French Smith stated that given the Department's belief that certain of the bid protest provisions are unconstitutional, "the legally appropriate course of action for the Executive Branch to follow...is to refrain from implementing those unconstitutional provisions of CICA."

Mr. Smith also justified the Department's action as having the "incidental effect of facilitating, rather than impeding, a judicial resolution of the constitutional issues in a timely fashion." While this may be true, an aggrieved bidder would still have standing to challenge the constitutionality of CICA if a stay were imposed due to the filing of a protest (Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 859 (1970)). Also, any bidders could seek a determination of constitutionality of CICA under the Declaratory Judgment Act, 28 U.S.C. §2201 and §2202. In either case, the Justice Department could intervene to raise the issue of CICA's constitutionality.

Not only do we believe that CICA's bid protest provisions are constitutional, but we also believe that it is incumbent upon the Executive Branch to follow the law. Surely such controversial and difficult constitutional issues should be decided after the presentation of divergent views in the courts, not within the confines of the Department of Justice. In this

regard, we wholeheartedly agree with Representative Peter Rodino, the chairman of the House Judiciary Committee, who recently stated in a letter to the Attorney General that "until a judicial determination on the constitutionality of a statute, it is the responsibility of government officials, no less than average citizens, to comply with that statute."

Our focus on CICA's bid protest provisions should not be interpreted to mean that the other implementation concerns mentioned earlier in our statement are unimportant. On the contrary, we are also concerned that unless revisions are made to the proposed implementing regulations to reflect our recommended changes, the purpose of CICA -- to enhance competition and strengthen the restrictions on unnecessary sole-source contracting -- will not be fully realized.

Again, Mr. Chairman, we commend you for holding these oversight hearings and will continue to work with you and Representative Horton to ensure that CICA is effectively implemented as we intended.

2. Statement of Computer and Business Equipment Manufacturers Association

STATEMENT OF THE



COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

OF THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

February 28, 1985

The Computer and Business Equipment Manufacturers Association (CBEMA) appreciates the opportunity to provide this statement for the record to the hearings on the Competition in Contracting Act. CBEMA is a trade association representing 38 member companies engaged in the manufacture or assembly of information processing, business and communications products and related services and supplies. In 1983 CBEMA member companies had combined sales of more than \$125 billion and employed more than one million people worldwide.

Based upon our reading of the Competition in Contracting Act (CICA) and its Conference Report and our familiarity with the Federal Government's procurement process, we do not see where a practical problem exists with the CICA mandated suspensions as to award and/or contract performance when a protest is filed with GAO.

The CICA directs that the Comptroller General shall normally issue a final decision concerning a protest within 90 working days from the date the protest is submitted. While the law does provide for an extension of this period, the Conference Report stated that "the conferees regard such extensions as

exceptional, however, and to be used in unique circumstances only." Furthermore, the CICA provides that "The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest."

Most importantly, if for some reason a protest continues to drag on or if at any time within 30 days of award the head of the purchasing activity determines that "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General," the CICA provides that the agency can proceed with a contract award or contract performance after notifying the Comptroller General in writing of such determination. It should be noted that the CICA clearly does not provide the Comptroller General with approval or disapproval authority over such determinations.

In light of the above provisions, CBEMA does not see where a practical problem exists in implementing the CICA in its present form.

Is the GAO bid protest system unnecessary since such matters may be settled in Claims Court, District Court, or the GSA Board of Contract Appeals (GSECA)? No, it is only prudent to continue GAO's activity in this area. The GAO provides the only other forum, outside expensive court litigation, for remedy for hundreds of small, medium and large firms when a GSECA remedy is not available and when competition has been avoided. Indeed, no group in the Government brings as much existing resources to bid protest resolution. An effective bid protest resolution function in GAO would meet a matter of practical necessity.

Although GAO does bring resources and expertise to bid protest resolution, we reasonably expect that additional resources may need to be committed. The CICA guidelines strengthen and expedite GAO's resolution of protests by imposition of the 90-day resolution goal and offer even lesser disruption to both agencies and vendors through the expedited 45-day option. There should be a dollar payoff for the both public and private sector.

The need for additional GAO resources is certainly an additional cost to Government, but it is small compared to the possible alternative, i.e., additional regulatory legislation, audits, and more Government controls. It is a fact that the procurement system will function better with an effective GAO protest resolution function. The GAO bid protest mechanism, creates a vendor self-policing environment to maintain the integrity of the process where large numbers of vendors can compete to the Government's advantage, keeping the market clean and honest.

Are the changes to the competition provisions in the new CICA so new that they will work to the abuse of the GAO protest system? We do not believe this is the case. The Commission on Government Procurement endorsed dialogue on most of the issues involved over a decade ago. We are encouraged that the CICA mandates that the GAO dismiss frivolous protestors who habitually abuse the system rather than following normal marketing procedures.

Will the new GAO protest procedure cause undue disruptions in the procurement process? No. The protest procedure is workable. In our opinion, to the extent that the agencies comply with the CICA, it will work. In reality we do not see any practical reason why the Act should not be implemented as written.

The CICA purposely established two alternate systems for ADP protests (GAO and the GSBICA) to allow the vendor community to have flexibility, responsibility, and choice in the procurement process. The CICA, in effect, set up a three year test to determine if this dual alternate approach is the best resolution or if one or both of these systems should be modified or eliminated. This experiment, which began on January 15, 1985, should be allowed to function in an uninhibited fashion thru the implementation of the CICA.

3. Statement of Arthur S. Miller, Professor Emeritus of Law, George Washington University

ARTHUR S. MILLER

1106 FLEMING STREET
KEY WEST, FLORIDA 33040

27th February 1985

RECEIVED

(305) 294-7207

MAR 4 1985

Rep. Jack Brooks
Chairman, Committee on HOUSE COMMITTEE ON
Government Operations GOVERNMENT OPERATIONS
U. S. House of Representatives
Washington, D.C. 20515

Att'n: Mick Long

Dear Mr. Chairman:

Mr. Mick Long of your staff has requested my views on the constitutionality of the Competition in Contracting Act of 1984 and the President's refusal to faithfully execute certain sections of that Act. I have studied the materials that Mr. Long sent to me and have the following comments to make. I speak as a professor, now emeritus, of constitutional law, who has served on the faculties of Emory University, George Washington University, and Nova University.

I begin by referring to an article I co-authored on the general subject: Arthur S. Miller & Jeffrey H. Bowman, Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem, 40 OHIO STATE LAW JOURNAL 51-80 (1979); perhaps you may wish to reproduce this article in the Hearings of your Committee. In this article, I concluded that presidential attacks on the constitutionality of federal statutes could not be sustained under the clear mandate of the Constitution. I see no reason to alter my opinion at this time, in the context of the Act under question. The Constitution is quite clear: The President, says Article II, "... shall take care that the laws be faithfully executed." There is no room for deviation. The Attorney General, as the legal officer for the President, is also bound by the terms of the Constitution. Unless and until, therefore, there is an authoritative decision by the Supreme Court on the constitutionality of the contested provisions, the President, the Director of the Office of Management and Budget, and the Attorney General are duty bound under the Constitution to follow the statutory provisions. The position of the Department of Justice on the contested provisions should be seen for what it is--a mere advocate's brief, not a dispassionate legal analysis. Permit me to quote from pages 58-59 of my article, mentioned above: "In 1937, Attorney General Homer Cummings refused a request from the President to render an opinion on the constitutionality of the Federal Home Loan Banks. The Attorney General stated that only the President would have the proper interest in questioning the validity of a measure passed by Congress, and given that interest ceases ten days after the bill is presented to him. If it were otherwise, Cummings continued, the Attorney General would be setting himself up as 'judge of the Acts of the Congress and of the President'. Forty years later, the Attorney General is doing precisely what Cummings said should not be done. . . ." Surely Attorney General Cummings was correct; and surely, too, Attorney General Smith was clearly in error.

I see no reason to expand upon the foregoing at this time, particularly in the light of the article I published and since you, so I understand, are obtaining the opinions of other professors of constitutional law on the question. I would like, however, to offer some suggestions for your consideration:

1. I think that the Congress conceded too much by only requiring a report from the Attorney General when that officer determines to contest or not to defend a duly enacted statutory provision. Inferentially, the Congress concedes such a power in the Executive--a power that, as I have said above, simply does not exist. I recommend, therefore, that your Committee take action to repeal the reporting requirement; and to replace it with a 'Sense of the Congress Resolution' that the Constitution means what it says.

In this connection, I would like to emphasize that, despite Executive Branch asseverations to the contrary, "the United States" is not to be equated with the Executive Branch--as, for example, in fulfilling the terms of 28 United States Code 2403. I make this clear in the article mentioned above. To my knowledge, there has never been a definitive determination of who, in the context of separation of powers questions, may be said to be "the" United States. Surely, however, there can be no valid reason for saying that the Executive is "the" government or "the" United States. If the Congress is to remain a constituent part of our government, it is highly necessary, in my considered judgment, not to throw the baby out with the bath water, as the above-mentioned reporting requirement does.

2. There are remedies that the Congress, as a body, or a Member or group of Members, might wish to explore. The most obvious is to bring a lawsuit for a declaratory judgment, or something similar, in which it would be argued that the President's (and his subordinates') actions in this dispute are unconstitutional. There are numerous cases where individual Members have brought lawsuits challenging Executive actions. The question is not a new one. See, in this connection, Note, Congress Versus the Executive: The Role of the Courts, 11 HARVARD JOURNAL OF LEGISLATION 352 (1974). See also Goldwater v. Carter, 100 Supreme Court Reporter 533 (1979), especially Mr. Justice Powell's concurring opinion, in which he said: "The spectre of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty 'to say what the law is'." Although the Goldwater case was held to involve a "political question," it is not really analogous to the present dispute. There, as Mr. Justice Rehnquist pointed out for the Court, the Constitution is silent about the Senate's participation in the abrogation of a treaty; here, the Constitution is not silent about the President's (and his subordinates') duty to faithfully execute the laws. The President had the choice of vetoing the bill or signing it; he cannot, as he seeks to do here, have something akin to a line-item veto over portions of a statute. I believe that the courts would so hold.

Another remedy, wholly constitutional, would be for the Congress to refuse to appropriate moneys for programs the Executive desires until such time as a binding commitment is received that Executive officers will abide by the clear constitutional requirement. After all, the Congress has the whip

hand insofar as appropriations are concerned. If the President wants to play "hard ball" in the present dispute, I would think that you and your colleagues would wish to respond in kind.

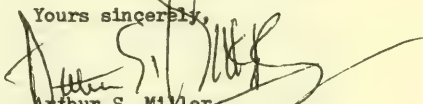
Finally, there is the forgotten remedy of impeachment. An impeachable offense is, as Rep. Gerald Ford said when in the House of Representatives, ~~the~~ anything the House chooses to say it is. Surely a failure to abide by the Constitution's express terms makes the Director of the Office of Management and Budget, as well as the Attorney General, susceptible to impeachment. After all, the House ^{did} impeach President Andrew Johnson for violation of the Tenure in Office Act; the fact that the Senate acquitted him by a single vote does not dilute the principle that, at least in extraordinary situations, impeachment should not be forgotten as a remedy when the Congress sees Executive officers acting unconstitutionally.

Some years ago, Senator Joseph Clark called Congress "the sapless branch"; and more recently, Rep. Barbara Jordan said that Congress had "lost the will to govern." The fundamental question that the present dispute poses is whether the Congress will regain the will to govern in the manner that the Founding Fathers contemplated. I have set out the suggestions above as possible ways that you and your colleagues could undertake. In saying this, I recognize that, as Woodrow Wilson wrote in 1908, cooperation more than conflict should be and is the norm between the legislative and executive branches, and that warfare between the two branches would be fatal to the constitutional order. But cooperation certainly does not mean that the Congress has to bow in manner supine to whatever the Executive wishes.

Finally, I would like to suggest that Congress not only has the power to fund all governmental programs but has the constitutional duty to ensure that appropriated moneys are properly spent. The statutory provisions under dispute seem to be an entirely reasonable way of satisfying that duty.

Should you wish me to expand on any of the foregoing, please let me know. I would appreciate if a copy of your Hearings and any report your Committee issues would be sent to me.

Yours sincerely,



Arthur S. Miller
Professor Emeritus of Law
George Washington University

P.S. Some years ago, when he chaired the Senate Subcommittee on Separation of Powers, Senator Sam Ervin often admonished Executive officers--including, so I recall, then Assistant Attorney General (now Mr. Justice) Rehnquist--that the President's constitutional power (duty) to "execute" the laws emphatically did not mean that "execute" meant "kill"; rather, it meant to implement them. As I mentioned above, the President is seeking to have an unconstitutional line-item veto over statutory provisions he dislikes. The Constitution does not give him that, and he should not be allowed to get it through the back door.

Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem

ARTHUR S. MILLER*
JEFFREY H. BOWMAN**

Can it be presumed, that Persons
sworn to execute the Laws, shall
openly counteract and violate them?¹

I. INTRODUCTION

To what extent may the President, through the Department of Justice, challenge the validity of federal statutes signed into law by the President? This constitutional question, newly emergent, lies at the core of several recent cases that deal with the congressional veto. The Supreme Court has thus far avoided ruling on the merits of the veto.² When the Court does so, as likely it will fairly soon, the Justices will perforce have to confront the question of the propriety of executive officers admitting the unconstitutionality of the veto or directly challenging the veto power. The Justices will also be confronted with the important, unresolved theoretical question of what is "the United States" in separation of powers litigation. Although the legislative veto has been extensively discussed,³ no attention

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In the interests of full disclosure, see Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965) and Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U. L. REV. 290 (1969). Professor Miller helped write the briefs for the House of Representatives in the *Clark* and *Atkins* cases and also for the General Accounting Office (GAO) in the *Staats* case, discussed *infra*.

**J.D. Candidate, George Washington University, 1979.

The authors wish to thank Mr. Jack Gordon for his assistance in the preparation of this article.

1. M. KAMMEN, *PEOPLE OF PARADOX* 42 (1972). The statement originally appeared in the *Independent Reflector*, a New York weekly newspaper, in 1753.

2. For example, the Court in *Buckley v. Valeo*, 424 U.S. 1, 140 n.176 (1976), expressly declined to decide the constitutionality of the one-house veto. See also *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977); *Atkins v. United States*, 556 F.2d 1028 (Cl. Ct. 1977), *cert. denied*, 434 U.S. 1009 (1978); *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (avoiding review of legality of a legislative veto provision based on a decision that even if it was unconstitutional, it was not severable from the rest of the statute).

Other than *Atkins*, there is little judicial comment on the constitutionality of the legislative veto. Justice White, for example, concurring in part and dissenting in part in *Buckley*, 424 U.S. at 256-86, was the only member of the Court to discuss the one-house veto provisions of the Federal Election Campaign Act. Justice White felt that regulatory power generally "is not rendered constitutionally infirm . . . by a statutory provision subjecting agency regulations to disapproval by either House of Congress." *Id.* at 284. See also *Sibbach v. Wilson*, 312 U.S. 1, 15 & n.17 (1941), in which the Court in dictum spoke positively, at least in policy terms, about legislative review mechanisms, lumping one-house veto together with simple layover measures.

3. See Bruff & Gellhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Javits & Klein,

has been accorded those two preliminary but critical questions which must be answered before there can be a definitive resolution of the growing use of the veto by Congress. This article outlines the issues associated with the congressional veto and suggests needed statutory reforms.

Two cases are illustrative. In *Clark v. Kimmitt*,⁴ Ramsey Clark, former Attorney General and candidate for Senator from New York, filed suit in federal district court as a "voter" under the Federal Election Campaign Act, for the sole purpose of testing the validity of the "one-house" veto provision of that statute. The statute requires the Federal Elections Commission (FEC) to submit proposed regulations to Congress, which has thirty legislative days to consider them. A formal vote of disapproval by either house is enough to kill the regulations, in whole or in part. If Congress does nothing, the FEC regulations become effective.⁵ Judge Charles Richey certified the case to the court of appeals, which, after an en banc hearing, dismissed the suit on procedural grounds.⁶ When Clark petitioned for certiorari, the Supreme Court requested the Solicitor General to file a brief on behalf of "the United States." At both appellate levels, the Department of Justice admitted or challenged the constitutionality of the one-house veto; in so doing, it equated "the United States" with the executive branch.

Similarly, when 140 federal judges sued in the Court of Claims for increased salary, the Department conceded the unconstitutionality of a legislative veto provision. That case, *Atkins v. United States*,⁷ presented the novel situation in which plaintiff and defendant agreed on the merits of the crucial statutory provision, yet the court forged ahead to rule on the merits. To the disappointment of the judges, the court upheld the legislative veto by a bare majority. *Atkins* remains the only instance thus far in which a court has definitively ruled on the legitimacy of the veto. The Supreme Court denied certiorari, after the Department of Justice continued to attack a segment of the statute that it had argued was otherwise valid. The Department again maintained that "the United States" was synonymous with the executive branch.

Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U.L. REV. 455 (1977); McGowan, *Congress, Courts, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

4. *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

5. An analogous method is employed for the adoption of federal rules of civil procedure. See the statement of Justices Black and Douglas dissenting to the Supreme Court order that amended certain rules of civil procedure, published at 374 U.S. 865, 865-66 (1966). See also Sibbach v. Wilson, 312 U.S. 1, 15 & n.17 (1941).

6. *Clark v. Valeo*, 559 F.2d 642, 647 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

7. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

These cases, and others of recent vintage,⁸ suggest several matters of concern in separation of powers theory and doctrine. First, both cases should have been styled *President v. Congress*, for that, in fact and in effect, is what they were. Former President Ford, in signing the Federal Election Campaign Act, said that the Attorney General would contest what the President thought was an unconstitutional provision.⁹ Second, Congress cannot always rely on the Department of Justice in litigation. Each house of Congress has had to hire special counsel so that the interests of Congress could be represented. Last, the Department is not required to notify Congress about its litigating posture. The consequence of this omission is that some statutory provisions duly enacted by Congress and signed into law by the President receive only ad hoc, even fortuitous defenses when attacked by private litigants. For instance, in *Atkins* only when the Court of Claims, sua sponte, wrote to the Vice President and the Speaker was Congress officially notified; it then came in only as an amicus, not as a primary party, for the judges had named the United States, not Congress, as defendant. The Executive, in such instances, has acted vicariously through private litigants.¹⁰

Under the United States Code, conduct of litigation for the United States is reserved to the Department of Justice: "Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the discretion of the Attorney General."¹¹ Additionally, the intervention statute, 28 United States Code section 2403, provides: "In any action . . . to which the United States . . . is not a party, wherein the constitutionality of any Act of Congress affecting public interest is drawn into question, the court . . . shall certify such

8. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *Chadha v. Immigration and Naturalization Serv.*, No. 77-1702 (9th Cir. appeal docketed July 18, 1977); *Nixon v. Solomon*, No. 77-1395 (D.C. Cir., filed Aug. 10, 1977); *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978); and *Staats v. Lynn*, No. 75-055 (D.D.C., Nov. 26, 1975) (dismissed by stipulation).

9. Federal Elections Campaign Act Amendments of 1976, Statement by the President on Signing S. 3065 Into Law, 12 WEEKLY COMP. OF PRES. DOC. 857, 858 (May 11, 1976). President Carter has taken the same position on the legislative veto as his predecessors. *The Legislative Veto—Message From the President of the United States*, 124 CONG. REC. H5879-80 (daily ed. June 21, 1978).

10. Individual members of Congress are making increasing use of the courts to test the validity of specific executive actions. *See, e.g.*, *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978) (challenging President's use of treaty power to convey United States properties to Panama); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (Family Practice of Medicine Act held to have become law despite President's refusal to sign).

The President has not attempted to obtain such a judicial test of a statute; it is thus uncertain whether the *Kennedy* strategy could be employed by the executive branch, although it is hornbook administrative law that officers of the federal bureaucracy cannot challenge the constitutionality of a statute addressing the powers of given agencies. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04, at 74 (1958). *See also* *Oestereich v. Selective Serv. Sys. Local Board No. 11, Cheyenne, Wyoming*, 393 U.S. 233, 242 (1968); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976); *Engineers Pub. Serv. Co. v. SEC*, 138 F.2d 936, 952 (D.C. Cir.), remanded per curiam with directions to dismiss as moot, 332 U.S. 788 (1947).

For a good but rather dated analysis of congressional attacks on executive power, see Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. LEGIS. 352 (1974).

11. 28 U.S.C. § 516 (1976).

fact to the Attorney General, and *shall* permit the United States to intervene . . . on the question of constitutionality."¹² Again, the Attorney General directs and controls the litigation.

Were two matters clear—the meaning of the term “the United States” and that the Attorney General is indeed an officer independent of the President and Congress—the problems to be discussed herein would not arise. If they did arise, the problems could be quickly resolved by a small change in the quoted code provisions. But these matters are distinctly unclear. It is, for example, disingenuous to assert that the Attorney General does not follow the wishes of the Chief Executive. Another unanswered issue is the litigating responsibility of the Attorney General: who, indeed, is his client when he represents the United States?

This article focuses on overt, albeit indirect, challenges by the Department of Justice in interbranch governmental disputes. We do not deal with other aspects of what in fact is a far larger problem. A comprehensive analysis should include inquiry into at least the following relevant issues: the nature and extent of prosecutorial discretion; failure of the executive branch to enforce judicial decisions, which under the principle enunciated in *Cooper v. Aaron*¹³ are “the law of the land”; refusals by the President to spend appropriated funds;¹⁴ assertions by a President during extraordinary emergencies that he can ignore statutes;¹⁵ neglect, by design or otherwise, to implement statutes;¹⁶ and choices that must at times be made between apparently inconsistent statutes.¹⁷ Fuller explication must await another time and another forum.

As is the norm in separation of powers, the delphic language of the fundamental law provides merely a point of departure for analysis rather than answers. There are, furthermore, no prescribed criteria of judgment—for example, the intentions of the framers—by which solutions can be obtained. When answers eventually come, they will incorporate a combination of political theory and policy considerations. Only by an intellectually indefensible fiction could answers be logical derivations from the constitutional text. Existing doctrine will play no part, for there is none. Little exists in the Constitution to provide more than a directional signal for further analysis: the President is vested with “the executive power,”¹⁸ but that is undefined; he must “take care that the laws”¹⁹ are

12. 28 U.S.C. § 2403 (1976) (emphasis supplied).

13. 358 U.S. 1 (1958).

14. *But see* *Staats v. Lynn*, No. 75-055 (D.D.C., Nov. 26, 1975) (dismissed by stipulation), discussed at notes 120-23 and accompanying text *infra*.

15. *See generally* Becker, *The Supreme Court's Recent "National Security" Decisions*, 40 TENN. L. REV. 1 (1972); *Developments in the Law — The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).

16. *E.g.*, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

17. *See, e.g.*, Miller & Pierson, *Observations on the Consistency of Federal Procurement Policies With Other Governmental Policies*, 29 LAW & CONTEMP. PROB. 277 (1964).

18. U.S. CONST. art. II, § 1, cl. 1.

19. *Id.* art. II, § 3.

faithfully executed; and he swears an oath to uphold and defend the Constitution.²⁰ As for Congress, it has all legislative power "herein granted,"²¹ which includes a rarely litigated provision of potentially immense significance—the second half of the "necessary and proper" clause: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²² The self-asserted power of the Supreme Court to be "infallible" because it is "final"²³ gives that tribunal, if it wishes to take the case and not flee into the swamp of the political question doctrine, an opportunity not only to settle the validity of the congressional veto but also to resolve the two subsidiary issues discussed in this article.

II. SOME RELEVANT HISTORY

Those who drafted the Constitution did not, of course, contemplate a legislative veto. If one were to follow an antiquarian conception of constitutional adjudication, then such a veto would doubtless be invalid. Despite contrary language from some commentators and judges, the Supreme Court has never been bound by such filiofetistic notions. So, too, with the power of the Executive to challenge the constitutionality of statutes; it is evident from the sparse records of the convention that the framers simply did not think of such a possibility. Thus the relevant history associated with our two matters of concern, that is, the propriety of the executive branch challenging the legislative veto and the identity of "the United States," consists of a clutch of judicial decisions, not one of which answers either of our questions, and the legislative history of the applicable United States Code provisions.

From 1787 to 1974, the Department of Justice failed to defend the constitutionality of a statute in only four instances: *Myers v. United States*;²⁴ *United States v. Lovett*;²⁵ *Simkins v. Moses H. Cone Memorial Hospital*;²⁶ and *Senate Select Committee v. Nixon*.²⁷ These decisions may be summarily treated.

Myers dealt with the power of the President to discharge, contrary to statute, a postmaster who had been confirmed by the Senate. The statute, the Tenure of Office Act, called for Senate approval of such actions. The approval requirement was declared unconstitutional in a long opinion by Chief Justice Taft, who repudiated the position he had taken as professor

20. *Id.* art. II, § 1, cl. 8.

21. *Id.* art. I, § 1.

22. *Id.* art. I, § 8, cl. 18.

23. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

24. 272 U.S. 52 (1926).

25. 328 U.S. 303 (1946).

26. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

27. 498 F.2d 725 (D.C. Cir. 1974).

and ex-President and upheld the Presidential prerogative. The postmaster had instituted the action against "the United States," but the Department of Justice argued the case on behalf of the postmaster. Congress was represented by Senator George Wharton Pepper as *amicus curiae*. The Solicitor General argued for the unconstitutionality of the statute.²⁸

Lovett, a better known case, concerned the constitutionality of a statutory provision that denied Lovett and his colleagues their salaries. The Department allied itself with Lovett and argued that when an Act of Congress is patently unconstitutional, the Constitution must predominate.²⁹ Lovett prevailed on the constitutional prohibition against any bill of attainder or ex post facto law. Congress, after being notified by the Attorney General that he could not in conscience argue for the validity of the statute, employed private counsel. As in *Myers*, no one questioned the propriety of the posture of the Attorney General.³⁰

Simkins came next, and differs in that it was a suit between two private litigants.³¹ Plaintiffs challenged their exclusion from federally funded hospitals constructed pursuant to the "separate but equal" provision of the Hill-Burton Act.³² Defendants objected to an attempted intervention by the United States through the Department of Justice, claiming that there was no constitutional issue and that intervention was improper when the United States sought to attack its own statute. These objections brought into issue the meaning of section 2403 and the legitimacy of the Department's action. The district judge felt constrained to read the intervention statute literally. Holding that the court lacked discretion in allowing intervention, the judge said: "I suppose [the Attorney General] can take any position he desires."³³ The Court of Appeals for the Fourth Circuit agreed and the Supreme Court denied certiorari.³⁴

28. 272 U.S. at 98.

29. 328 U.S. at 306.

30. *Id.*

31. Therefore 28 U.S.C. § 2403 (1976), quoted at text accompanying note 12, came into play.

32. 323 F.2d at 961. The challenged provisions were a portion of the Hospital Survey and Construction (Hill-Burton) Act of 1946, Pub. L. No. 79-725, 60 Stat. 1040, 1043 (1946), as amended, 42 U.S.C. § 291e(f) (1976). See also 42 C.F.R. § 53.112 (1977).

33. Transcript of Oral Argument at 84, *Simkins v. Moses H. Cone Memorial Hosp.*, No. C-57-G-62 (M.D.N.C. 1962), *aff'd*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); reprinted in *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 2d. Sess., 489 (1976) [hereinafter cited as *Hearings on Congress in Court*].

But compare the Court's decision on intervention in *Smolowe v. Delendo Corp.*, 36 F. Supp. 790, 792 (S.D.N.Y. 1940), *aff'd*, 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943):

In permitting this intervention, I am of the belief that the constitutionality of subdivision (b) of § 16 has been "drawn in question." By this I do not mean to hold that from now on the government has free rein in this litigation. The government itself recognizes the limited purpose of its intervention when it concedes that it is only interested on the state of the pleading in presenting evidence and arguments in support of the constitutionality of subdivision (b).

34. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

Simkins is the one case that has to date squarely posed the meaning of section 2403. It is here that the section's legislative history becomes relevant. During the formative years of the New Deal, 1934-1936, the Supreme Court struck down thirteen acts of Congress: one-fourth of the total number that it had previously invalidated. Most of the statutes were anti-Depression measures. Particularly vexatious to the President and Congress was that many of these decisions resulted from private suits in which no one appeared on behalf of the government.³⁵ Public policy was being made in those lawsuits, which at times concerned only trivial matters for the litigants but had portentous consequences for the nation. An example is the *Gold Clause Cases*³⁶ in which national monetary policy turned on whether a plaintiff was entitled to recover fifteen dollars and sixty cents—a situation that bemused some Europeans, who could not understand how such important policy matters could be left to settlement by lawyer-judges in private litigation.³⁷

Under pressure from the White House, Congress enacted H.R. 2260, which ultimately became 28 United States Code section 2403, "to provide for appearance on behalf of and appeal by the United States in certain cases in which the constitutionality of acts of Congress is involved."³⁸ The House Judiciary Committee report on the bill recognized the need for such a statute: "In cases between private litigants in which the constitutionality of an act of Congress is attacked by one of the parties, no representative of the Government may now appear as a matter of right to defend the statute."³⁹ Can there be any doubt that Congress, by enacting H.R. 2260, intended to provide a means whereby the public's (the government's) interest could be *defended* in private litigation? The answer is clear beyond peradventure; as President Roosevelt commented, the statute "accords the Government the right to defend the constitutionality of the law of the land. No longer must the Government stand idly by, a helpless spectator, while the Acts of Congress are stricken down by the Courts."⁴⁰ The court was obviously on shaky ground when intervention was granted in *Simkins* to permit the Department of Justice to attack the "separate but equal"

35. The analogy today is that no one appears on behalf of Congress, save when Congress itself is the defendant.

36. *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935); *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935).

37. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 103-04 (1941).

38. Conference Report on H.R. 2260 (August 10, 1937) reprinted in *Hearings on Congress in Court*, *supra* note 33, at 485.

39. H.R. REP. NO. 212, 75th Cong., 1st Sess. 1 (1937). *Atkins v. United States* illustrates this concern: Congress was before the court only as amicus and then only by the court's unilateral invitation. 556 F.2d 1028, 1034 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

40. White House Press Release, August 25, 1937, at 2, reprinted in 122 CONG. REC. S 17,084 (daily ed. Sept. 29, 1976). A further indication of the intent of Congress is that § 2 of H.R. 2260, which became 28 U.S.C. § 1252 (1976), and which provided *inter alia* that if the United States intervenes and the court decision declares the Act of Congress unconstitutional, then an appeal could be taken directly to the Supreme Court.

provision of the statute. Because of intervening lawmaking, that provision has become clearly invalid. There was no real need for the Department to defend the statute.

*Bailey v. Patterson*⁴¹ had held that racial segregation under official auspices was no longer "a litigable issue." Thus, in *Bailey*, the district court had merely to take judicial notice of previous Supreme Court decisions which held that no state may require racial segregation of transportation facilities.⁴² Then in *Simkins* the Department explained to the district court that "it is indisputable that today Congress would not include a 'separate but equal' provision in a statute"; and "the United States" position in this case is not "calculated to disappoint Congressional expectation."⁴³ In other words, Congress had no defense to the constitutional challenge and would not expect the Department to defend such a statute. *Simkins* is thus a case in which the Executive attacked the constitutionality of a statute, but which provides little basis for similar present-day actions. It is one thing for the Department of Justice to attack a statute when all, including Congress, can see that the statute is invalid; and quite another to do so when the essence of the dispute lies between President and Congress. Judge Richey recognized that distinction, at least inferentially, when he denied the Department intervention of right in the *Clark* case and granted only permissive intervention.

Finally, in *Senate Select Committee v. Nixon*, the Solicitor General filed an amicus brief on behalf of the United States, asserting "that the United States has an overriding interest in the doctrine of executive privilege."⁴⁴ Such a statement meant that the Department equated "the United States" with the executive branch, an understandable posture for lawyers caught up in zealous pursuit of their client's interests; it also meant that the Department considered the President to be its client. One can readily understand the Executive taking such a position; what is beyond comprehension is for the Supreme Court to invite, as it did in *Clark*, a brief from the Department on behalf of "the United States." Since, as we have said, the case should have been styled *President v. Congress*, one can only conclude that the Justices were not thinking when they issued the request to the Department. The only alternative conclusion is that the Court has already prejudged the question of who is "the United States," and has decided in favor of the Chief Executive. If so, that would indeed be a parlous situation.

One additional historical item is relevant. In 1937, Attorney General

41. 369 U.S. 31, 33 (1962).

42. E.g., *Boynton v. Virginia*, 364 U.S. 454 (1960); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam); *Morgan v. Virginia*, 328 U.S. 373 (1946).

43. Unreported memorandum of United States in *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964), reprinted in *Hearings on Congress in Court*, supra note 33, at 484.

44. 498 F.2d at 726.

Homer Cummings refused a request from the President to render an opinion on the constitutionality of the Federal Home Loan Banks.⁴⁵ The Attorney General stated that only the President would have the proper interest in questioning the validity of a measure passed by Congress, and even that interest ceases ten days after the bill is presented to him. If it were otherwise, Cummings continued, the Attorney General would be setting himself up as "judge of the Acts of the Congress and of the President."⁴⁶ Forty years later, the Attorney General is doing precisely what Cummings said should not be done, by asserting the prerogative to attack a statute in two situations: (1) when "upholding the statute would have the effect of limiting the President's constitutional powers or prerogatives";⁴⁷ and (2) when "the Attorney General believes, not only as a matter of personal conscience, but also as the chief legal officer of the United States, that a law is so patently unconstitutional that it cannot be defended."⁴⁸

*Clark and Atkins, McCorkle v. United States*⁴⁹ and *Chadha v. Immigration and Naturalization Service*,⁵⁰ and other cases exemplify the current situation concerning the congressional veto. Some of these cases are brought against Congress and the Department must intervene; some are against the United States and the Department is a party as a matter of right; and some are against a specific agency and the Department acts as the lawyer for that agency.

It might be thought that in *Chadha* and similar cases there is no true case or controversy since the advocates are wholly in agreement on the crucial issue, the validity of the congressional veto. Under normal circumstances, the suit would be dismissed on procedural grounds, there being no controversy to satisfy the requirement of article III of the Constitution. *Atkins* could have been decided that way, but was not. Speaking generally, other courts have sidestepped the case or controversy problem and gone on to the merits, as in *Atkins*, or become entangled with other procedural issues, as in *Clark*. How judges can find a true adversary proceeding when plaintiff and defendant agree on the crucial issue is completely mysterious.⁵¹

45. 39 Op. ATT'Y GEN. 11 (1937).

46. *Id.* at 15. For the proposition that the executive branch should defer to the courts on constitutional questions, see 40 Op. ATT'Y GEN. 158 (1942); 36 Op. ATT'Y GEN. 21 (1935); 31 Op. ATT'Y GEN. 475 (1919).

47. *Hearings on Congress in Court*, *supra* note 33, at 5. Under those circumstances, asserts the Department, the President is "entitled to a defense of his perceived rights." *Id.*

48. *Id.* at 6.

49. 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

50. No. 77-1702 (9th Cir. *appeal docketed* July 18, 1977). See notes 125-31 and accompanying text *infra*.

51. The question of the *standing* of the Attorney General to challenge the constitutionality of statutes is not given full-dress treatment here. Only if the courts perceive that the question in the cases being discussed is really *President v. Congress*, rather than a private litigant against a government department, can it be said that rights are indeed in conflict, and then only if the President has a "right" in fact. It is our position in the present paper that the President does not have a justiciable article III right. He piggybacks on private litigants, such as Mr. Chadha, and goes into court—as in the *Clark*

III. WHAT IS "THE UNITED STATES"?

We come, then, to our first question: what, in constitutional theory, is "the United States"? In most cases in which the Department of Justice participates, whether civil or criminal, the answer is obvious. It is a question that cannot be burked, however, when, as is increasingly the vogue, separation of powers issues are before federal courts. Neither court nor commentator has supplied an answer to the question. This section outlines a possible approach to an answer.

The United States of America originated as a legislative body in October 1774, when the First Continental Congress produced the "Declarations and Resolves of the First Continental Congress."⁵² Proclaiming for their respective Assemblies the right to legislate for the colonies, "the good people of the several Colonies" devised the Continental Association—a merchants' agreement to cut off trade with England.⁵³ According to one commentator, "the signature of the Association by members of Congress may be considered as the commencement of the American Union."⁵⁴ Before the 1787 Constitution was adopted, all acts of the United States of America were executed in the person of the Congress. The Congress was the manifestation of the United States in *all* its capacities, so that what was not performed by the Congress was not performed by the United States.⁵⁵ Even so, one might still conclude that under the Articles of Confederation the United States was something more than just the Congress. The central government, consisting solely of a unicameral legislature, had actual powers that were of marginal utility. Even though the Articles defined the United States as a "congress assembled,"⁵⁶ the individual states were able to retain their "sovereignty, freedom and independence"⁵⁷ by cloaking the Congress with a very limited subject matter jurisdiction, and by denying Congress the power to enforce its own legislation, particularly in the area of requisitions. Congress would call for money, but had to await the voluntary compliance of the States.⁵⁸

As Madison had observed, congressional inability to enforce its objectives was responsible for the impotency of the Congress, in particular,

case—without any real disagreement between plaintiff and the Justice Department on the merits. See also Comment, *An Attorney General's Standing Before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. CHI. L. REV. 624 (1959) (dealing mainly with state, not federal, cases).

52. H. COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 82 (5th ed. 1949).

53. *Id.* at 83. This clause is embodied within the fifth paragraph of the Declaration.

54. R. HILDRETH, 3 *HISTORY OF THE UNITED STATES* 46 (1882).

55. See H. HOCKETT, *POLITICAL AND SOCIAL GROWTH OF THE UNITED STATES* 246 (1933).

56. ARTICLES OF CONFEDERATION art. 2.

57. *Id.*

58. See J. MADISON, *DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 5 (G. Hunt & J. Scott eds. 1920); *THE FEDERALIST* No. 15, at 157 (A. Hamilton) (B. Wright ed. 1961).

and the United States as a whole: "[T]he states relieved from the pressure of foreign danger, and flushed with the enjoyment of independent and sovereign power; instead of a diminished disposition to part with it, persevered in omissions and in measures incompatible with their relations to the federal government."⁵⁹ Hamilton agreed: having "total want of *SANCTION* to its laws,"⁶⁰ Congress passed resolutions which became "mere recommendations which the States observe or disregard at their option."⁶¹

It is not surprising that many delegates to the Constitutional Convention conceived of the national Executive as an extension of the Congress. Quite a few delegates had originally thought it the goal of the Convention merely to amend the existing Articles to provide the Congress—in other words, "the United States"—with the powers that it had been lacking. Once there was a consensus that a new constitution would be devised, many delegates nevertheless believed that the basic reform would provide Congress with the means for enforcing its acts. For example, Sherman thought that the purpose of the Executive would be to carry the will of the Legislature into effect, and that the Executive should thus be accountable to the Legislature.⁶² Sherman's view of the Executive, as being logically and functionally subordinate to the Legislature, was not unique. The original "Randolph plan" even contemplated election of the Executive by the Legislature. Although this method of executive selection was eventually rejected, it received majority approval throughout the Convention.⁶³ The final plan, of course, attempted to achieve a balance between efficiency and tyranny.⁶⁴

Thus, in attempting to define "the United States," one must look not only at the particular *branches* into which the government had been divided, but also at the *reasons* for having so divided it. To the extent that the creation of quasi-independent branches of government may be a means to impede the wheels of government and thus prevent the tyranny that would otherwise result from the concentration of powers in one hand, it is appropriate to apply a functional analysis to the scope of executive powers. An unchecked power to pick and choose those laws that are worthy of enforcement,⁶⁵ a power currently asserted by the executive branch, is as fatal to effective government as it was when the states existed

59. J. MADISON, *supra* note 58, at 5.

60. THE FEDERALIST No. 21, at 186 (A. Hamilton) (B. Wright ed. 1961) (emphasis added).

61. THE FEDERALIST No. 15, at 158 (A. Hamilton) (B. Wright ed. 1961).

62. J. MADISON, *supra* note 58, at 5.

63. See generally E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 255-63 (1964).

64. Modern scholarship is beginning to refute the conventional wisdom that considers separated powers solely as a bulwark against tyranny. See, e.g., L. FISHER, PRESIDENT AND CONGRESS 1-27 (1972); W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965).

65. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838).

under the Confederation. At its logical extreme, such power could mean an item veto of existing law.

The measure of a government's power can be related to the nature and extent of its sovereignty. Insofar as all power within the federal government theoretically must find its source within the Constitution, the United States, as a sovereignty, can be defined by the powers granted to it from the people through the Constitution.⁶⁶ One can readily see the basic disparities between the English and American systems of government: unlike the English model, in which all sovereign power is thought to emanate from the Crown,⁶⁷ the American system presupposes a popular sovereignty. Thus, English history represents a series of restrictions upon powers that had already been in existence; a series of increased limitations that the people managed to place upon the otherwise presumptively sovereign power of the Crown. Our Constitution, on the other hand, as well as the United States, a fortiori, represents successive grants of powers of sovereignty that were not otherwise promised. American sovereignty rests within the people who have merely expressed their will in the form of constitutional grants.⁶⁸

The Crown thus acts in its legislative capacity, subject to the *limitation* that it does so within the confines of ministerial responsibility. In contrast, "the United States" exercises power not from the vantage point of having had preexisting powers that have been subsequently restricted, but rather from the position that it had no previous powers except those that were specifically granted. Thus, in its legislative capacity, "the United States" possesses the affirmative powers granted to the Congress, as well as the negative power of the President to veto legislation: "The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws."⁶⁹

It appears to be historically correct to define "the United States" by the powers conferred by the Constitution and to find any particular department of the government acting within its sovereign capacity when it acts within the scope of constitutionally delineated powers. Should one necessarily conclude that the President's sole power to disapprove legislation lies in the veto, and that the Justice Department, therefore, acts improperly when it attacks a law as unconstitutionally infringing upon the powers of the President? On the contrary, in *Myers v. United States*,⁷⁰ the

66. *E.g.*, *Perry v. United States*, 294 U.S. 330, 353 (1935); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885).

67. "The law," said Sir William Blackstone, "ascribes to the King the attribute of sovereignty: he is forever sovereign and independent within his own dominion." W. BLACKSTONE, COMMENTARIES *241-42, cited in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458 (1793).

68. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793).

69. THE FEDERALIST NO. 73, at 469 (A. Hamilton) (B. Wright ed. 1961).

70. 272 U.S. 52 (1926).

Court held that executive acquiescence to a congressional act that infringed upon the President's appointment powers could not be demonstrated by the President signing the bill into law, particularly when the repugnant provisions of the Act were attached to an urgently needed appropriations bill. At the urging of the Department of Justice, the Court in *Buckley v. Valeo*⁷¹ also held that a particular statute infringed upon executive power and therefore was unconstitutional, notwithstanding that it had been duly enacted and signed into law by the President.⁷² Justice Rehnquist, writing for the majority in *National League of Cities v. Usery*,⁷³ noted that *Myers* and *Buckley* seemingly reject the argument that the veto would be the President's sole weapon to protect his own interests.⁷⁴

Within the above framework, the identity of "the United States" remains unclear. The assumption underlying separation of powers theory and the intervention statute, 28 United States Code section 2403, is that the President and Congress will cooperate rather than fight. Indeed, as long ago as 1908, Woodrow Wilson stated that "warfare" between Congress and the Executive would be "fatal."⁷⁵ If separation of powers theory means anything, it means that powers are shared, not separated.⁷⁶ As Justice Story put it, the framers accepted a tripartite division of government but "endeavored to prove that a rigid adherence to it in all cases would be subversive of the efficiency of the government, and result in the destruction of public liberties."⁷⁷

"The United States," then, is a construct; it is a metaphysical entity. In constitutional theory, it exists even though it cannot be seen or touched. No one has yet spelled out what "the United States" means, save in specific instances, such as first amendment cases, in which the interests of an individual are balanced against those of "society." Under the present statute,⁷⁸ the identity of "the United States" remains unclear. It is clear, however, that "the United States" should not—indeed, cannot—be equated with the executive branch. That conclusion is buttressed by an examination of the interests of "the United States."

The recent case of *United States v. American Telephone & Telegraph Co.*⁷⁹ (*AT&T*) is relevant. In *AT&T* the Justice Department sought to

71. 424 U.S. 1 (1976).

72. *Id.* See also *National League of Cities v. Usery*, 426 U.S. 833, 841-42 n.12 (1976).

73. 426 U.S. 833 (1976).

74. *Id.* at 841-42 n.12.

75. W. WILSON, *CONSTITUTIONAL GOVERNMENT* 51-52 (7th ed. 1927).

76. "[W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 334 U.S. 579, 635 (1952) (Jackson, J., concurring).

77. 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 533, at 396 (5th ed. 1891).

78. 28 U.S.C. §§ 516-519 (1976).

79. 551 F.2d 384 (D.C. Cir. 1976).

enjoin the defendant from complying with a subpoena issued by a House Subcommittee. Asserting that it was representing the United States, the Department brought the suit to protect the "public interest." The court of appeals recognized that although outwardly the case was between the government and a private corporation, it actually was between the President and the House of Representatives. The President did not want to produce taped telephone calls because of an alleged interest in national security; the House, on the other hand, had an interest in obtaining compliance with the subpoena power that it had invoked to obtain records of certain telephone calls. The only interest of AT&T was in obtaining a judicial declaration of its legal obligation. Although finding jurisdiction elsewhere, the court questioned the propriety of the Department's desire to secure jurisdiction under 28 United States Code section 1345, the grant of jurisdiction over suits brought by the United States. The difficulty, said the court, was "whether a suit is brought 'by the United States' within § 1345 when the executive branch is seeking to enjoin the legislative branch."⁸⁰

Of course there is a "difficulty"; no one branch of government can be said to be "the United States." The United States may be hydra-headed, but it is a single entity. Before demonstrating this, however, we will briefly mention several inter- and intrabranched cases that have posed problems about the nature of that entity.

In *United States v. Nixon*,⁸¹ the President argued that the court lacked jurisdiction because the controversy concerned an "in-house" dispute raging within the executive branch. That view was rejected and the Supreme Court proceeded to rule on the merits, allowing an employee of the executive branch—the Special Prosecutor—to sue his putative superior, the President. At least inferentially the court's decision means that "the United States" is not to be equated with "the President." The next conclusion is more difficult, but nonetheless clear: despite the *Nixon* decision, "the executive branch" is not "the United States."

One way to answer the question, what is "the United States," is to ask another question: what is an interest of "the United States"? A brief discussion of this additional question is relevant at this time, in the context of some judicial decisions.

The problem of identifying an interest of the United States in in-house disputes was first considered by the Supreme Court in *United States v. ICC*.⁸² The government, through the Department of Justice, sought to have set aside an Interstate Commerce Commission (ICC) order that denied the government restitution for allegedly unlawful rates charged by the railroads. Since all suits seeking review of ICC orders were required by

80. *Id.* at 389. For a discussion of the AT&T case, see Comment, *United States v. AT&T: Judicially Supervised Negotiations and Political Questions*, 77 COLUM. L. REV. 466 (1977).

81. 418 U.S. 683 (1974).

82. 337 U.S. 426 (1948).

statute to join the United States as a party defendant, the Commission sought dismissal on the ground that the United States was suing itself. The Court refused to be straitjacketed into such black-letter pronouncements, holding that while the case might technically be *United States v. United States*, it presented conflicts that were of a traditionally justiciable type. The government, therefore, had the right to redress its injuries as a shipper.

The situations presented in *AT&T* and *Clark* are radically different from that presented in *ICC*. In *ICC*, plaintiff United States did not appear in a governmental capacity, but rather as an ordinary commercial user of the railroads. The government's interest was pecuniary and thus more easily identifiable. On the other hand, *AT&T* concerned the political controversy of the proper allocation of power within the government. In such interbranch disputes the interest of "the United States" is more difficult to identify, although not entirely impossible. There is, however, a threshold problem: to identify who will determine that interest. As the Department of Justice argues, the United States has an interest in the proper application of the Constitution. It merely avoids the issue, however, to maintain that since the Attorney General is authorized by statute to represent the interests of the United States, then the Attorney General, and a fortiori, the President, has the authority to determine those interests when the office of the President has a self-serving interest to protect vis-a-vis the Congress.

As an officer within the executive branch, the Attorney General often blurs the distinction between the broader interests of the government and the narrower ones of the President. For example, when the one-house veto provisions of the Federal Election Campaign Act were under constitutional attack in *Clark*, the Department of Justice sought intervention as plaintiff. Defendant Valeo challenged the propriety of this appearance by "the United States" to attack the constitutionality of its own statute, particularly when the Federal Elections Commission was defending the statute. Although the district court allowed the government to intervene "on behalf of the entities represented by the United States, namely, the President of the United States, and the Executive Branch of the federal government,"⁸³ its decision was obviously based upon incongruously identifying the United States with its agent, the Executive. In effect, the cart was put before the horse. Although the President undoubtedly represents the United States in certain constitutionally delineated areas, this does not establish that the interests of the two entities are interchangeable. The basic difficulty with the Department's position is that it fails to adopt a position in litigation on behalf of "the United States" that does not involve the intermediary step of identifying the United States exclusively with the executive branch.

83. *Clark v. Valeo*, 559 F.2d 642, 647 n.4 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

The court of appeals dismissed *Clark* for lack of ripeness, thus finding it unnecessary to address the propriety of the appearance by the United States "to argue for a judicial declaration of unconstitutionality of an act of Congress in the interest of the President and Executive Branch alone."⁸⁴ Judge Tamm, however, squarely addressed the issue in his concurring opinion:

Nothing in our decision today should be taken as an approval of the sweeping claim of the United States that in the absence of both a statutory authorization to sue and an articulated injury to an interest of the federal government as a whole, it nonetheless can come into court and challenge the actions of one branch of the federal government as an unconstitutional invasion of the powers of another branch.⁸⁵

The "articulated injury to the whole" test proposed by Judge Tamm would be consistent with the cases concerning pecuniary interests, such as *ICC*, as well as with our view that "the United States" encompasses more than any of its particular departments.

Cases affirming the broad discretionary power of the Attorney General to undertake litigation on behalf of the government have typically presented an articulated injury to the government as a whole. The discretionary power is the Department's control over whether suit should be brought. Thus, scandalous decisions not to prosecute generally have been left to the realm of politics and newspaper headlines.⁸⁶

When the Attorney General's power has been judicially expanded, interbranch disputes have not been at issue. The benefits of the expanded power did not inure to the political advantage of one branch over another branch. In the leading case of *United States v. San Jacinto Tin Co.*,⁸⁷ the government brought suit to set aside a land patent that allegedly was fraudulently issued. The Court rejected defendant's challenge to the authority of the Attorney General to bring suit, ruling that when the United States has a just cause requiring judicial relief, the Attorney General has the authority to institute the suit on behalf of the government. Crucial to the Court's position was the government's pecuniary interest in its valuable mineral ores. *San Jacinto* consequently has no bearing on the proper role of the Department of Justice in cases concerning the proper allocation of power within the government. *In re Debs*⁸⁸ expanded the Attorney General's authority to sue on behalf of "the United States" even though there was no pecuniary interest at stake. Nevertheless, the government's interest in unobstructed mail service is properly dis-

84. *Id.*

85. *Id.* at 654 (Tamm, J., concurring).

86. Political interference in the administration of justice is a related problem that is beyond the scope of this article. At least one court, however, has held that plea bargaining results are subject to judicial approval. *E.g.*, *United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977).

87. 125 U.S. 273 (1888).

88. 158 U.S. 564 (1894).

tinguishable from the type of interest alleged in politically oriented interbranch disputes.

A more difficult case is *Booth v. Fletcher*,⁸⁹ in which the Attorney General's power to defend federal judges was upheld upon the theory that the government has an interest in the proper performance of its officers' duties, free from retaliatory actions. Judge Tamm, in *Clark*, describes such an interest as one "shared by the United States as a whole and distinct from an interest in defending the theory of one particular branch of the government as to its constitutional prerogatives."⁹⁰ While such an interest lacks the certainty otherwise available when defining a pecuniary interest, *Booth*, unlike *AT&T* and *Clark*, did not bear upon constitutional issues or concern an interbranch dispute. Nor was the Department of Justice seeking to defend the powers of the President against alleged legislative intrusion.

The proper advocacy role of the Attorney General involves legal ethics.⁹¹ Attorneys act to further the best interests of their clients to the extent the law permits. The Attorney General's client, by statute, is "the United States." Given the excessive tendency to confuse the narrow interests of the executive office with the broad interests of the nation, it is difficult to maintain that the President, as chief executive, determines the best interests of the nation in interbranch litigation. The United States has an indisputable interest in the enforcement of presumptively valid legislation, an interest that at least equals the President's interest in, for example, executive privilege. This was verified by the experience under the Articles of Confederation. At least in interbranch disputes, "the United States" has no role to play. While "the United States" may have an interest in the correct application of the Constitution, the conflicting interests of segments of the United States Government cancel each other out; a judicial determination of rights should be reached without the Justice Department pursuing the President's own interest in the manner of Presidential special counsel.

Thus, we suggest that in interbranch litigation there is no such thing as "the United States." There is the interest of the President, as in executive

89. 101 F.2d 676 (D.C. Cir. 1938).

90. *Clark v. Valeo*, 559 F.2d 642, 656 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977) (Tamm, J., concurring).

91. The Department of Justice disagrees, concluding that [t]he issue is not so much one of ethics in [the context of *Buckley v. Valeo*] as comity. Where a legislative codefendant has been made aware of a contrary Department of Justice view, retains its own counsel on that issue, and requests the Department to continue representation on issues where there is no difference of opinion, the precise manner of submitting the Attorney General's views becomes one of accommodation and not ethics.

Hearings on Congress in Court, *supra* note 33, at 138.

In *Buckley*, the Department of Justice's so-called amicus brief on behalf of the Federal Election Commission had five sections to it, and the first four did in fact contain an amicus brief. At the start of the fifth section, however, the Department assumed the role of an advocate and argued that the statute should be declared unconstitutional in certain respects. Therefore, in the fifth section, which was physically part of the amicus brief, the Department of Justice was actually attacking the statute.

privilege, and the interest of the Congress in the enforcement of its laws. The interest of "the United States," if anything, is the interest of the people of the United States in the fulfillment of constitutional provisions and in adequate, responsive government.

Because an interest of "the United States" should be an interest of the entire government, we can proceed to state affirmatively the meaning of the term. It is to be equated with another ambiguous term, "the State."⁹² What, then, is the State? The term is not easily defined.

Consider a recent assertion of Judge Roger Robb in *Halkin v. Helms*.⁹³ In denying relief to Americans who had been spied upon by the National Security Agency, Robb called the "state secrets privilege" absolute, adding that "a ranking of the various privileges recognized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list."⁹⁴ The meaning of Robb's statement is subtle, yet important: Judge Robb was articulating a theory of the State that could be called organismic. The State has interests that transcend those of the individuals in society, either singly or in groups.

This organismic conception of the State has a long intellectual history, although no judge has ever spelled it out in detail. One example is Justice Holmes' famous statement in *Missouri v. Holland*:

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they also created a nation.⁹⁵

Judge Learned Hand also maintained that judges "called upon to pass on a question of constitutional law . . . must be aware of the changing social tensions in every society which make it an organism."⁹⁶ Finally, Woodrow Wilson commented that

government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life.⁹⁷

Hand, to be sure, spoke of society being "an organism," and Wilson of government being "organic"; Holmes came closest to our notion of the

92. For analysis, see E. CASSIRER, *THE MYTH OF THE STATE* (1946); A. D'ENTREVES, *THE MODERN NOTION OF THE STATE* (1946); G. POGGI, *THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION* (1978).

93. No. 77-1922 (D.C. Cir. June 16, 1978).

94. *Id.* slip opinion at 11.

95. 252 U.S. 416, 433 (1920).

96. Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930).

97. W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56 (1908).

State. The three terms—society, government, State—are here employed synonymously. Expressed another way, the State—and thus “the United States”—is an anthropomorphic “group-person”⁹⁸ with interests that transcend the arithmetical sum of the interests of the individuals within the body politic.

That theme, we suggest, runs through much of American constitutional law. It is to be seen particularly in the law stated by federal judges when they assert that they are “balancing interests” in civil rights cases between those of the individual and those of a never-defined entity called “society.”⁹⁹ It would seem that the Supreme Court also analogizes the group “the United States” to a biological being. The nation-state thus is considered by the Court and political figures, such as the President, to be a real person; the State is considered to have an existence separate and apart from the individuals who live within its geographical boundaries. President John F. Kennedy gave expression to this idea of a transcendent “public interest” in 1962, when he answered a reporter’s question concerning collective bargaining agreements:

These companies are free and the unions are free. All we [the Executive] can try to do is indicate to them the public interest which is there. After all, the public interest is the sum of the private interests, or perhaps it’s even some times a little more. *In fact, it is a little more.*¹⁰⁰

In other words, the nation takes on a life of its own, separate from and greater than any of its constituent parts or, of greater significance, the arithmetical sum of the private interests of the entity called “the United States.” Under this conception, “the United States” is greater than the sum of the people of the nation—not the government and surely not one branch.¹⁰¹

This metaphysical conception of the State will not be pursued further. Our point is that when one speaks of “the United States,” one evokes an entity that encompasses society *and* government in a single artificial being. The Constitution “in operation,” as well as the Constitution “of the books,”¹⁰² recognizes the State as the overarching social reality. The State

98. O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800* (E. Barker trans. 1934), discussed in A. MILLER, *PRESIDENTIAL POWER* 157 (1977).

99. Sometimes judges use “government” rather than “society,” but whatever the word employed, no one takes the trouble to define what is meant. Often, of course, the meaning of “government” is obvious. To equate society with government, however, is a particularly faulty type of thinking and writing. Government is the apparatus of the State; society is that which is governed, an association of discrete individuals who often associate in groups. As a general rule, the three terms—government, State, and society—should be carefully distinguished and not used as synonyms. See, e.g., E. CASSIRER, *supra* note 92; A. D’ENTREVES, *supra* note 92; H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (A. Wedberg trans. 1945); G. POGGI, *supra* note 92.

100. N.Y. Times, Mar. 8, 1962, at 1, col. 4 (emphasis added).

101. On the dangers of such a conception, see, e.g., A. MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* 154-61 (1976); A. DE RIENCOURT, *THE COMING CAESARS* 9-10 (1964) (originally published in 1957); Barker, *Introduction* to O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY, 1500 TO 1800*, at xxxiv (1957) (Gierke’s work was originally published in 1913; Barker’s translation was made in 1933).

102. W. WILSON, *CONGRESSIONAL GOVERNMENT* (1885).

exists much like the business corporation—an artificial construct that is more a method than a thing; and it exists in constitutional theory, even though it has “no anatomical parts to be kicked or consigned to the calaboose; no soul for whose salvation the parson may struggle; no body to be roasted in hell or purged for celestial enjoyment.”¹⁰³ As a legal fiction, the State—“the United States”—itself does no act, speaks no word, and thinks no thoughts, but in its name those in government speak and for its benefit men may die and property may be seized.

Surely that is what Judge Tamm contemplated when he spoke of an “articulated injury to an interest of the federal government as a whole.” Surely, too, this construct makes it clear that no single branch can speak for “the United States” when it conflicts with spokesmen for other branches. And surely the Department of Justice is wrong in equating the executive branch with the United States.

IV. THE PROPRIETY OF EXECUTIVE ATTACKS ON STATUTES

Once it is perceived that “the United States” is a single entity with multiple heads, then the question who should decide interbranch disputes becomes important. *United States v. Nixon*¹⁰⁴ established that the writ of the Supreme Court can run against the President. Mr. Nixon capitulated, after some hints from counsel that he might not, as did President Truman following the decision in the *Steel Seizure Case*.¹⁰⁵ Nevertheless, Presidential acquiescence in judicial pronouncements is by no means certain. One need not cite President Jackson’s perhaps apocryphal sneer “John Marshall has made his decision; now let him enforce it,” to realize that Chief Executives have been known to ignore a judicial decision. *Ex parte Merryman*¹⁰⁶ is perhaps the leading example. *Ex parte Quirin*¹⁰⁷ could have been another but was not, principally because the Supreme Court reacted supinely to executive demand.¹⁰⁸ Presidents, moreover, do not have to overtly defy a judicial decree; when their own powers are not at

103. W. HAMILTON, ON THE COMPOSITION OF THE CORPORATE VEIL 4 (1946), *quoted in* R. EELLS & C. WALTON, CONCEPTUAL FOUNDATIONS OF BUSINESS 132-33 (1961). Although Professor Hamilton was speaking of the corporation, his remarks apply to the State as well.

104. 418 U.S. 683 (1974).

105. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

106. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (President cannot suspend the privilege of the writ of habeas corpus).

107. 317 U.S. 1 (1942).

108. In *Quirin*, President Roosevelt convened a special tribunal of military officers to try Nazi saboteurs even though the civil courts were operating and the United States itself was not a theater of war; this action was upheld by the Supreme Court even though in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court had invalidated the court martial of an alleged spy because the civilian courts were open. For a recounting of the difficulties the Court and Attorney General Biddle had in finding a legal basis for so trying the Germans, see F. BIDDLE, IN BRIEF AUTHORITY (1962); A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

issue, they can merely ignore it—as President Eisenhower did after the decision in *Brown v. Board of Education*.¹⁰⁹

In *Clark* the Justice Department contended that the veto represented “an infringement of the Constitution which it has an interest in protecting. . . .”¹¹⁰ The problem with this position is at least twofold. First, as Judge Tamm said in his concurring opinion,

Not only does this argument assume a role for the Executive as “the protector of the Constitution, but it also presupposes a decision on the merits of the suit. Whether the statutory provisions the Government seeks to challenge do or do not infringe on the constitutional powers of the President remains a question for the courts to decide, not the Executive.”¹¹¹

In other words, Judge Tamm would not permit a bootstrap presentation. It should be recalled that the Justice Department was granted only permissive intervention in *Clark*, and not intervention of right. Arguments against the constitutionality of the legislative veto were ably presented by Mr. Clark’s lawyers; there was no need for any executive intervention.¹¹² Second, even taking the Justice Department’s contention about protecting the Constitution at face value, to attack the constitutionality of a validly enacted law flies in the face of the President’s constitutional duty to execute the laws faithfully. The Department’s response to this is that the Constitution, as the fundamental law, must also be executed. Predicated upon Supreme Court pronouncements begun in 1803 with *Marbury v. Madison*¹¹³ and culminating in 1974 with *United States v. Nixon*,¹¹⁴ conventional wisdom acknowledges that the Supreme Court makes law when interpreting the Constitution.¹¹⁵ That being so, the Executive has a constitutional duty to execute the law as made by the Supreme Court, and that law cannot be defied, as in *Merryman*, or ignored, as in *Brown*. We do not maintain that this conclusion would be accepted by the Department of Justice; but surely it is the logical extension of the Department’s argument that it has an interest in protecting the Constitution. Furthermore, the Executive should not be allowed to pick and choose from among constitutional provisions and judicial interpretations thereof: the article II

109. 347 U.S. 483 (1954).

110. *Clark v. Valeo*, 559 F.2d 642, 654 (D.C. Cir.), *aff’d sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

111. *Id.* at 654 (Tamm, J., concurring).

112. Litigation, like politics, makes strange bedfellows. It is interesting to note that Clark’s counsel came from the organization of Ralph Nader, who has directed much of his reformist energy against the Executive rather than Congress. See, e.g., Miller, *Whistle Blowing and the Law*, in *WHISTLE BLOWING* 25 (R. Nader, P. Petkas & K. Blackwell eds. 1972). Mr. Nader opposes the congressional veto because it offers an industry lobbyist a “third bite of the apple”; the first bite is taken while the bill is pending, the second when the administrative regulations are proposed.

113. 5 U.S. (1 Cranch) 137 (1803).

114. 418 U.S. 683 (1974).

115. A candid acknowledgment of this lawmaking was expressed by Justice White, dissenting in *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting).

duty of faithful execution of the laws does not give the President any discernible discretion.

It is evident from the foregoing that perceiving "the United States" as a single entity makes the propriety of the Justice Department judicially challenging an act of Congress dubious at best. Additional reasons support this conclusion. First, on technical but sound historical grounds, no one is permitted to sue himself. This is true not only for natural persons but also for artificial persons, such as corporations. A fortiori, the principle also applies to the State—"the United States." This latter statement, however, should be a two-way street, which would make *Kennedy v. Sampson*¹¹⁶ and *Nader v. Bork*¹¹⁷ questionable. Congress should not be able to argue that the Department of Justice cannot challenge statutes, while simultaneously doing the same itself. Thus, the *Kennedy* and *Nader* cases should have been styled *Congress v. President*.

Second, the Presidential obligation faithfully to execute the laws does not give the Chief Executive a selective item veto over the laws he is to execute. Execution means enforcement and defense; it emphatically does not mean "killing" some laws the President does not like.¹¹⁸ This has been conclusively shown by the many cases on impoundment of funds.¹¹⁹ Under the express terms of the Constitution, the President can veto bills passed by Congress, but he does not have an item veto—and that is precisely what he is attempting to enforce in cases such as *Clark* and *Atkins*.

Third, the undefined term, "executive power," at the beginning of article II provides no basis for an independent reading of the Constitution. In this connection, the little-noted but important case of *Staats v. Lynn*¹²⁰ becomes significant. Under the Budget and Impoundment Control Act of 1974, the Comptroller General is authorized to challenge any refusal by the Executive to spend appropriated funds because he considers the appropriation to be invalid.¹²¹ In 1976, funds for housing were withheld by

116. 511 F.2d 430 (D.C. Cir. 1974). See note 10 *supra*.

117. 366 F. Supp. 104 (D.D.C. 1973) (members of Congress had standing to sue for declaration of the illegality of discharging Watergate Special Prosecutor Cox by the acting Attorney General).

118. Cf. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.").

119. E.g., *Train v. City of New York*, 420 U.S. 35, 42-48 (1975) (rejecting the argument that Congress intended to grant wide discretion to the Executive to control amounts spent under the Federal Water Pollution Control Act Amendments of 1972); *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973) (rejecting a claim of Presidential discretion under the Constitution); *State Highway Comm'n of Mo. v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd*, 479 F.2d 1099 (8th Cir. 1973) (holding that anti-inflationary goals expressed in other statutes cannot justify executive defiance of specific spending legislation).

120. No. 75-0551 (D.D.C. Nov. 26, 1975) (dismissed by stipulation).

121. Impoundment Control Act of 1974, 31 U.S.C. §§ 1400-1407 (1976). See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the "Sweeping Clause"*, 36 OHIO ST. L. J. 788 (1975). As Justice Jackson said in the *Steel Seizure Case*, "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

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the Office of Management and Budget (OMB); Mr. Staats, the Comptroller General, brought suit against the President, the Director of OMB, and the Secretary of Housing and Urban Development (HUD). After the President was dropped as a party, the name of the case was changed from *Staats v. Ford* to *Staats v. Lynn*; Lynn was the Director of OMB. The General Accounting Office (GAO) was confronted with the defense that the executive function under the Constitution permitted only the President, through the Department of Justice, to represent the government in court.¹²² Therefore, the argument went, the GAO, a "legislative" agency, was improperly exercising an executive function. The case did not go to final decision because the funds were released and spent by HUD.

Staats is significant because it brings to center stage the propriety of one branch of the federal government suing another branch. Can the provision in the Budget Act be constitutionally justified? Under the analysis we have put forth, the answer is no; the case should have been styled *Congress v. President*. There is, however, an even stronger constitutional case to be made for Congress than for the President. Under the Constitution Congress may make all laws "necessary and proper" to carry out Congress' delegated powers and also those of any other department of the entire government.¹²³ Since the appropriations power is expressly vested in Congress, can there be any doubt that laws considered necessary should be valid, particularly under the expansive reading given the first part of the clause in *McCulloch v. Maryland*?¹²⁴ Otherwise, how is Congress to ensure that its will is fulfilled? Must it wait for the fortuity of a suit brought by some citizen? We suggest that, under the Constitution, Congress is not constrained to wait. In sum, the GAO's authority to sue under the Budget Act is valid.

We do not maintain that separation of power questions are mere logical deductions from unclear constitutional terms. No doubt it is true that most of these questions are settled through the political process, and that the courts do not have and should not have a substantial role in resolving these questions. Even so, when the text of the necessary and proper clause is, as L'il Abner would say, "clear enough that any fool kin plainly see," it is not a logical deduction from a nebulous term. It is an

On the technical question of sovereignty, it could be argued that since Congress, speaking generally, must waive sovereign immunity for immunity to be operative, Congress is "sovereign" in the national government. See, e.g., *Driver v. Helms*, 456 F. Supp. 496 (D.R.I. 1978). That type of technical argument, however, would hardly be persuasive in the situation under discussion.

122. See Williamson, *GAO Goes to Court: The Impoundment Case, A Review of Background and Issues in the First Lawsuit Ever Initiated by the Comptroller General in His Own Right*, [1977] GAO Rev. 55.

123. U.S. CONST. art. I, § 8, cl. 18. Professor Van Alstyne has cogently shown that the latter half of the necessary and proper clause has a "horizontal" as well as a "vertical" effect. Van Alstyne, *supra* note 121.

124. 17 U.S. (4 Wheat.) 316 (1819).

application of the plain, the *only* meaning of that clause to say that Congress does indeed have ultimate power in such circumstances. One may not like that, and surely the Executive does not, but the words are there—and can be read in only one way. Within the multi-headed State that is “the United States,” Congress is supreme—when it wishes, which by any criterion is not very often.

One may feel compassion for Mr. Jagdish Rai Chadha, who quite possibly was treated shabbily by Congress when it vetoed the recommendation of the Immigration and Naturalization Service that he be granted a permanent visa.¹²⁵ *Chadha*, however, is not analogous to *Simkins*, in which the court merely had to take judicial notice of controlling precedent to invalidate the ‘separate but equal’ provision of the Hill-Burton Act.¹²⁶ Should compassion for a litigant guide a court? Should important constitutional theory turn on the status of an alien about to be deported? If the answer to that is yes, then there has been a definite move toward the creation of a truly independent Executive.

What policy considerations should judges employ in legislative veto cases? One has been mentioned, but surely there is enough in Professor Wechsler’s fervent plea for neutral principles¹²⁷ to conclude that a lawsuit that presents important constitutional issues should not be decided on the fact that Congress acted shabbily. The problem is one of power, not of wisdom.¹²⁸ As Justice Frankfurter said in *Dennis v. United States*, “Much that should be rejected as illiberal, because repressive and envenoming, may well not be unconstitutional.”¹²⁹ Mr. Chadha is incidental to the case; without him the judicial process could not have been triggered. The crucial issue is not whether Chadha can be deported by “the United States”; of course he can be deported. Rather, the issue reflects a tug of war between the Executive and Congress to determine whether the means of his deportation comports with the Constitution. Chadha is not arguing deprivation of procedural due process; rather, he seeks to invalidate one of the ways that Congress has invented to effect accountability of the public administration.

A ruling on the merits will mean that public policy can be made by parties who are in agreement on the basic issue being litigated. If permitted, this signals a breakdown of the adversary system. No doubt the system has faults,¹³⁰ but should they be dealt with in an ad hoc, helter

125. See *Chadha v. Immigration and Naturalization Serv.*, No. 77-1702 (9th Cir. appeal docketed July 18, 1977), in which, as of this writing, the Attorney General is challenging the constitutionality of § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1976), pursuant to which the United States House of Representatives vetoed the decision of the Immigration and Naturalization Service to suspend the deportation of the petitioner Jagdish Rai Chadha.

126. See notes 31-34 and accompanying text *supra*.

127. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

128. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

129. 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring).

130. See Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justice: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

skelter manner? The answer can only be negative. It is completely mysterious why, under any of the accepted interpretations of the article III case or controversy requirement, a federal court should entertain the suit. One need only cite *Muskrat v. United States*¹³¹ as conclusive authority that such a case should be dismissed.

Furthermore, Congress, which passed the statute being litigated, is not a primary party in the lawsuit. Thus, Congress, which surely has as much interest in the litigation as the Immigration and Naturalization Service or the Executive, has no control over the conduct of the suit. It appears as amicus only—hardly the posture any litigant would desire. So it was in *Atkins* and will be in other congressional veto cases not filed against Congress. Some means should be found to bring Congress directly into such judicial proceedings—on a regular, continuing basis. The State—"the United States"—may be a single entity, but it is hydra-headed, each head being "equal in origin and equal in title."¹³² That equality fails if Congress is relegated to the inferior position of *amicus curiae*.

Finally, the Department of Justice has at times lacked the decency formally to notify Congress that it is attacking a statutory provision duly signed into law by the President. Contrast the manner in which Attorney General Francis Biddle proceeded in the *Lovett* case—notifying both Houses of Congress that he would support Lovett—with the failure to notify in *Atkins*.¹³³ It is bad enough for a statute to be challenged, but it is even worse for such a challenge to be mounted by surprise and without any attempt to inform Congress about the Department's actions. At the very least, Congress is entitled to believe that, unless it is otherwise notified, its statutes will be defended by the Department. Moreover, it is entitled to believe that its statutes will be defended fully—not, as in *Buckley v. Valeo*,¹³⁴ with a partial effort.

On the basis of policy considerations as well as constitutional theory, Presidential attacks on the constitutionality of federal statutes founder. Such attacks fall far short of the degree of cooperation between the political branches which, as Woodrow Wilson noted, is the forgotten part of separation of powers.¹³⁵ The two branches must, and in most respects do, cooperate. When they differ, as in the legislative veto, the dispute should not be resolved by a group of lawyer-judges. Let the politicians resolve their separation of powers problems, as they can if they have the will to do so.

131. 219 U.S. 346 (1911) (holding that it is beyond the power of Congress to require the judicial branch to render advisory opinions).

132. *Gordon v. United States*, 117 U.S. 697, 701 (1864) (*per Taney, C.J.*).

133. 89 CONG. REC. A5350-52 (1943) (letter of Francis Biddle). *Cf. Atkins v. United States*, 556 F.2d 1028, 1058 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) ("At oral argument, the Department of Justice conceded the unconstitutionality of section 359(1)(b).").

134. See note 91 and accompanying text *supra*.

135. W. WILSON, *supra* note 75.

V. CONCLUSIONS AND RECOMMENDATIONS

Warfare between the two political branches of the federal government can be fatal to the constitutional order. Americans can no longer subscribe to the half-truth that powers were separated to prevent despotism.¹³⁶ Cooperation is a necessity, as is accountability. The problem is to make necessary exercises of power as tolerable and decent as possible. Despite some extravagant statements to the contrary, Congress emphatically is not in the driver's seat in government. We have witnessed "the rise of the bureaucratic state."¹³⁷ The bureaucracy is indeed ascendant, and may be out of control. Certainly it is not controllable by judicial review. As Professor Neustadt has pointed out, many a President has learned that he may be the Chief Executive, but he still has to negotiate with the fiefdoms in the public administration.¹³⁸

That, however, is the larger problem. Our immediate interest lies in the propensity of Presidents and their Attorneys General to attack statutes. What, if anything, should be done about it? A major step for reform in this area could be a measure passed in the waning days of the 95th Congress.

On October 14, 1978, the Department of Justice Appropriation Authorization Act¹³⁹ received final congressional approval. Section 13 of the Act is the result of an amendment introduced by Congressman Elliott Levitas. Section 13 requires that the Department of Justice report to the appropriate committees of Congress any time that the Department does not defend a statute of the United States, but rather concedes that it is unconstitutional or attacks the validity of the statute.¹⁴⁰ The Department of Justice must transmit this report within thirty days after the Attorney General determines the position of the Department is that the provision in question is not constitutional.¹⁴¹ According to the Act, after making such a report, the Justice Department is required to declare in court that the Department is representing the position of the executive branch of government and therefore, by inference, is not representing the position of "the United States" on the constitutionality of the statute.¹⁴²

Congressman Levitas, in detailing the reasons for his amendments, explained that

[i]n recent years the executive branch through the Justice Department has more and more taken it upon itself to decide that a statute passed by the

136. *United States v. Brown*, 381 U.S. 437, 442-46 (1965).

137. Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INTEREST 77 (1975). This, to be sure, is not a novel insight of Professor Wilson. See, e.g., D. WALDO, *THE ADMINISTRATIVE STATE* (1948).

138. R. NEUSTADT, *PRESIDENTIAL POWER* (1960).

139. Department of Justice Appropriation Authorization Act, Fiscal Year 1979, Pub. L. No. 95-624, 92 Stat. 3459.

140. *Id.* § 13(a).

141. *Id.* § 13(b).

142. *Id.* § 13(c).

Congress and signed by the President, or enacted over his veto, is unconstitutional [; that] the Congress found out about this action in a willy-nilly, informal fashion without any reporting, requires that this action be done.¹⁴³

Moreover, with regard to the Department of Justice representing the interests of "the United States," Congressman Levitas said,

[M]y amendment is designed solely to do two things: first, notify the House and the other body when they [Department of Justice] are going to blackjack us. We are saying we want them to let us know about it when they are going to sandbag us, and then at that point they cannot claim to represent the United States anymore; they are only representing the executive branch of the government and not the United States, because when an Act of Congress is passed and signed into law, it is the law of the United States, and I do not want the Justice Department to pretend to be defending the United States when it is not.¹⁴⁴

Prior to the Levitas amendment, three other proposals for reform were addressed to this separation of powers problem. One proposal was the Separation of Powers Defense Act¹⁴⁵ introduced in 1976 by Senator James Abourezk. Briefly, the bill would: (1) require the Attorney General to notify Congress of civil actions when the Department has decided not to appeal a decision holding congressional acts unconstitutional, thus enabling Congress to intervene and appeal the decision; (2) amend the law providing district court jurisdiction for suits on behalf of the United States,¹⁴⁶ so that jurisdiction would not exist in actions by the United States alleging the unconstitutionality of an act of Congress; (3) amend the law that authorizes intervention by the United States to argue questions concerning the constitutionality of acts of Congress,¹⁴⁷ so that the Justice Department could only argue in favor of the constitutionality of an act; and (4) permit Congress to intervene of right in suits in which the constitutionality of an act of Congress is not defended by the Justice Department or in which the Attorney General has decided not to appeal a decision holding an act unconstitutional. As Senator Abourezk explained, the purpose of the bill "is not to prevent the executive branch from bringing an action or intervening in actions which challenge the constitutionality of acts of Congress, but rather to prevent the

143. 124 CONG. REC. H11, 120 (daily ed. Sept. 28, 1978) (remarks of Rep. Levitas).

144. *Id.*

145. S. 3854, 94th Cong., 2d Sess. See 122 CONG. REC. S17,076-84 (daily ed. Sept. 29, 1976).

Additionally, § 250(a)(1) of the proposed Watergate Reform Act, S. 495, 94th Cong., 2d Sess., would have authorized Congress to retain counsel who would be asked to intervene on behalf of Congress when the Department of Justice refused to represent Congress. See 122 CONG. REC. S12,114 (daily ed. July 21, 1976). Senator Abourezk had earlier introduced the provision as separate legislation. S. 2731, 94th Cong., 1st Sess., 121 CONG. REC. 38056 (December 2, 1975). The pertinent features of these bills have been introduced in the 95th Congress as part of S. 555, the Public Officials Integrity Act of 1977. See 122 CONG. REC. S1902-31 (daily ed. Feb. 1, 1977).

146. 28 U.S.C. § 1345 (1976).

147. *Id.* § 2403.

executive branch from asserting that it represents the United States when it does so."¹⁴⁸

In contrast, the plan of Congressman Frank Thompson presents a less sweeping approach toward reform.¹⁴⁹ Thompson's bill, similar in some respects to the Levitas amendment, would require any federal agency, including the Department of Justice, to notify Congress if the agency fails to enforce or defend any law enacted by Congress because it feels that the law is unconstitutional. Under the bill, situations such as *Atkins* would be avoided.¹⁵⁰ Under the Thompson bill, Congress would be notified of challenges by the Department of Justice to the constitutionality of a statute within thirty days after the Attorney General had made such a determination.

The third proposal, also submitted by Congressman Levitas,¹⁵¹ urged that: "None of the funds made available by the Title may be used by the Department of Justice directly or indirectly to urge the unconstitutionality of any statute of the United States unless such statute has previously been held unconstitutional by decision of the Supreme Court of the United States."¹⁵² Under this Levitas approach, the opinion and litigation responsibilities of the Attorney General would remain unaffected except in those instances in which the Attorney General concludes that a statute is unconstitutional. At that point, the Attorney General, although having concluded that a federal statute was unconstitutional, could not "urge" its unconstitutionality in an opinion or litigation.

These plans to prevent the Attorney General from attacking the constitutionality of a federal statute raise a common question of constitutionality: to what extent may Congress regulate the Department of Justice?¹⁵³ Few outside the executive branch would disagree with the analysis of former Senator Sam J. Ervin that "[a]ll powers of the Attorney General and the Department of Justice flow from Acts of Congress. There can be little doubt—in fact, no doubt at all—that what Congress gives, Congress can take away."¹⁵⁴ *McGrain v. Daugherty*¹⁵⁵ offers encourage-

148. 122 CONG. REC. S17,076 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk).

149. Copy of Thompson draft obtained from Congressman Levitas' office. The bill was not introduced, for reasons unrelated to the reform discussed here.

150. See text accompanying notes 7-10 *supra*.

151. This amendment was apparently not introduced because a point of order raised by Congressman Rousselot to the relevant appropriation was sustained. See 124 CONG. REC. H5525-26 (daily ed. June 14, 1976).

152. Letter from Patricia Wald, assistant Attorney General, to Congressman Peter Rodino, Chairman, House Committee on the Judiciary (June 26, 1978) (copy on file at Ohio State University Law Library).

153. Complete analysis of the question is beyond the scope of this article. For an exhaustive discussion of the subject, see Note, *Removing Politics From the Justice Department: Constitutional Problems With Institutional Reform*, 50 N.Y.U.L. REV. 366 (1975).

154. *Removing Politics From the Administration of Justice: Hearings on S.2803 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 3 (1974).

155. 273 U.S. 135 (1927).

ment for that position. In *McGrain*, the Supreme Court said that "the function of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants are all subject to regulation by congressional legislation."¹⁵⁶ The proposals listed above thus appear to be a proper form of congressional "regulation."

The question really is not the constitutional validity of these proposals, but whether they go far enough. We suggest that they do not. Should each or even all be adopted, something further is required. Briefly, that "something" is a permanent lawyer or legal staff for Congress, similar to the Office of the Solicitor General. Manned by superior lawyers, such an office could perform a number of continuing functions: (1) litigating separation of powers problems; (2) providing legal advice to both Houses of Congress and their committees; and (3) monitoring the scrutiny of proposed administrative regulations under the many statutory provisions for legislative veto.¹⁵⁷ In some respects, this last function would be the most important.

On October 12, 1978, the Congress gave its final approval to the Ethics in Government Act,¹⁵⁸ which could be an important first step toward the establishment of an Office of Congressional Legal Counsel. The Act requires detailed public financial disclosure by top federal officials in all three branches of government. The Act also establishes restrictions on postservice activities by officials and employees of the executive branch. Additionally, the Act sets up a mechanism for the appointment of a temporary special prosecutor in cases of criminal wrongdoing by top executive branch officials. Finally, and most importantly to this article, Title 7 of the Act establishes an Office of Senate Legal Counsel to represent the interest of the Senate in court. Title 7 also confers jurisdiction on the courts to enforce Senate subpoenas.

Ideally, there should be established a joint House-Senate Office of Congressional Legal Counsel. Indeed, the original Senate bill provided for an Office of Congressional Legal Counsel to represent both houses. The House version, however, did not contain a comparable provision and the conferees were not willing to accede to the Senate version since the appropriate committees of the House had not considered the question.¹⁵⁹ It is understood, however, that the Senate Legal Counsel will consult with the House on litigation matters of interest to both houses.

There can be no doubt that Congress has the power to establish such an office despite the contrary arguments of the Executive in *Staats*.¹⁶⁰

156. *Id.* at 178.

157. For a compilation, see Norton, Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and Inventory of Statutory Authority (1976) (published by the Library of Congress' Congressional Research Service).

158. Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

159. See CONF. REP. NO. 95-1756, 95th Cong., 2d Sess. 80 (1978).

160. See text accompanying notes 120-22 *supra*.

Surely the time has come for Congress to have its own lawyer, rather than having counsel on an ad hoc basis. Creation of a fulltime congressional legal counsel and the proposed legislation to control the Department of Justice are reforms needed to blunt Presidential attacks on the constitutionality of federal statutes.

APPENDIX C.—MATERIALS RELATING TO THE COMPETITION IN CONTRACTING ACT

1. March 6, 1985.--Letter from Comptroller General Charles A. Bowsher to Chairman Jack Brooks discussing the basis for the Executive branch's decision not to execute or defend certain provisions of the Competition in Contracting Act.



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-208159

March 6, 1985

The Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

This responds to your request for our comments by March 6, 1985, on a letter dated February 22, from the Attorney General to the Chairman, House Judiciary Committee, discussing the basis for the Executive Branch's decision not to execute or defend certain provisions of the Competition in Contracting Act, Pub. L. No. 98-369. As explained below, we believe that the letter fails to demonstrate any reasonable basis for the decision.

In essence, the Attorney General's argument is that the Executive Branch may refuse to execute or defend any statute which, in its view, constitutes an encroachment by the Legislative Branch of government on a power vested in the Executive under the Constitution. From this premise, the Attorney General concludes that the Executive Branch may refuse to execute or defend certain provisions of the Act--specifically, the provisions requiring agencies to suspend or "stay" a protested procurement action until the Comptroller General issues a decision on the protest and authorizing the Comptroller General to award attorney fees and bid or proposal preparation costs--on the ground that those provisions violate constitutional separation of powers principles.

The Attorney General's argument regarding the Executive Branch's authority to disregard duly passed laws may be acceptable in some hypothetical case involving a statute which is patently unconstitutional, for example, an Act of Congress violating the express constitutional prohibition on ex post facto criminal laws. The Act, here, clearly is not a patently unconstitutional statute.

B-208159

In fact, we believe the Act is free from any constitutional defect. The Act thus falls outside whatever limited exception may exist to the Executive Branch's obligation to faithfully execute duly enacted statutes.

Moreover, while the Attorney General characterizes the refusal to implement the Act as being in furtherance of separation of powers principles, it is more consistent with those principles to accord a presumption of constitutionality to a statute passed by Congress, a coequal branch whose members also are sworn to uphold the Constitution. In fact, the Executive Branch's decision can be seen as violating separation of powers principles to the extent that it has chosen to ignore a duly passed Act of Congress before the Act's constitutionality has been considered by the judicial branch.

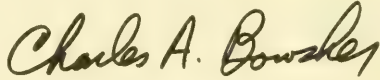
The Attorney General also maintains that the Executive Branch is acting in accordance with its duty to resist attempts by Congress to alter the balance of power by arrogating to itself power which, it believes, the Constitution vests in the Executive Branch. We think, however, it is the Attorney General who has arrogated to himself legislative power by rewriting the "stay" provision of the Act. Moreover, as we said in testimony before your Committee, the Act imposes few limitations upon executive action in a field long-recognized to be a proper concern of the Congress, contracting by the federal government. The disputed "stay" provision can be avoided by executive agencies when required by the pressing needs of the United States, and the payment of compensation or damages to private claimants cannot reasonably be claimed to have major constitutional significance.

Finally, the Attorney General argues that the Executive Branch's refusal to execute the Act facilitates judicial review by ensuring that there are parties with standing to raise the constitutional issue. We think that judicial review could be obtained without ordering all Executive Branch agencies to defy the Act's "stay" provisions. The Attorney General should try to minimize

B-208159

defiance of the Act, not encourage it. In any event, we do not view the goal of facilitating judicial review as sufficient justification for the Executive Branch's refusal to carry out the law.

Sincerely yours,

A handwritten signature in dark ink, reading "Charles A. Bowsher". The signature is written in a cursive style with a large, prominent "C" and "B".

Comptroller General
of the United States

2. March 1, 1985.--"GAO Chief Assails Reagan's Stance on Bid Protests," Washington Post.



CHARLES A. BOWSHER
... sees violation of Constitution

GAO Chief Assails Reagan's Stance On Bid Protests

Comptroller General Charles A. Bowshe yesterday accused President Reagan of violating the Constitution by defying a federal law designed to strengthen the General Accounting Office's role in handling bid protests.

The 1984 Competition in Contracting Act gave the GAO authority to hold up a federal contract if a valid bid protest was on file with government auditors. The Reagan administration views that provision as unconstitutional, and last year the Justice Department and the Office of Management and Budget ordered agencies to ignore it.

Yesterday, in testimony before the House Government Operations subcommittee on legislation and national security, Bowshe weighed into the simmering controversy by contending that "it is the president who has violated the separation of powers doctrine by defying a duly-passed act of the Congress through the actions of the attorney general and the director of OMB."

Washington Post
March 1, 1985

The administration has argued that the comptroller general, who heads the GAO under a fixed 15-year term, is a representative of the legislative branch and thus cannot hold up contracts awarded by the executive branch. Bowshe argued that he is an officer of the United States, appointed by the president and confirmed by the Senate, and not subject to the "whims" of congressional influence.

"Disobedience of the law is itself a matter of serious constitutional significance," Bowshe testified. "We cannot find any justification for the action taken to deliberately avoid the law in this case."

Bowshe's position was supported at the hearing by several constitutional law authorities, including a representative of the American Bar Association.

Eugene Gressman, a University of North Carolina law professor, said that the administration's action "constitutes a willful disobedience of the will of Congress. In our constitutional system of government, such a refusal by the executive to 'take care that the laws be faithfully executed' cannot and must not be tolerated."

The subcommittee has scheduled a second hearing next week to hear testimony from OMB Director David A. Stockman and Attorney General Edwin Meese III.

3. February 27, 1985.--Letter from Judiciary Committee Chairman Peter W. Rodino, Jr. to Chairman Jack Brooks transmitting the Attorney General's response to the Judiciary Committee letter concerning bid protest provisions.

NINETEENTH CONGRESS

PETER W. RODINO, JR. (PA), CHAIRMAN

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STAFF DIRECTOR:
 GARNER J. CLINE
 ASSOCIATE COUNSEL:
 ALAN F. COFFEY, JR.

U.S. House of Representatives
 Committee on the Judiciary
 Washington, DC 20515
 Telephone: 202-225-3951

February 27, 1985

RECEIVED

FEB 27 1985

HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

Honorable Jack Brooks
 Chairman
 Committee on Government Operations
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Jack:

On February 5, 1985, I wrote to inform you of a letter I sent to the Attorney General regarding his notification to Congress that the Department of Justice would refrain from defending certain bid protest provisions of the Competition in Contracting Act of 1984. This notification from the Attorney General also stated that the Executive Branch would not comply with these bid protest provisions pending a judicial determination of their constitutionality.

For your information, I am enclosing a copy of the Attorney General's response to my letter.

Sincerely,


 PETER W. RODINO, JR.
 Chairman

Enclosure
 PWR/jpc



Office of the Attorney General

Washington, D. C. 20530

February 22, 1985

RECEIVED

FEB 25 1985

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, D. C. 20515

JUDICIARY COMMITTEE

Dear Chairman Rodino:

Thank you for your letter of January 31, 1985, and the opportunity to explain further this Department's position with respect to its duty to enforce and defend certain provisions of the Competition in Contracting Act of 1984 (CICA), which was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

Your letter requested reports concerning the legal precedent and authority for the Department's directing agencies to refrain from complying with those provisions of the statute and the Department's expressed intention to refrain from defending the validity of those aspects of the statute in future litigation. You also requested lists of all instances in which the Department has determined not to execute or not to defend a statute. Because the legal theories and precedents underlying the Executive Branch's decisions not to execute or not to defend a statute are inextricably intertwined, I have combined in the following paragraphs the discussion of the historical practice and precedents in this area. The Department has also attempted within the time available to compile a list, set forth in the Appendix to this letter, of all refusals to execute or defend statutes and to provide as much of the additional information you requested as possible. 1/ Given the records available, we cannot be confident that we have identified every such instance prior to this Administration.

1/ We have not created separate lists for refusals to defend statutes and refusals to execute statutes because the two categories overlap. Thus, for example, in Myers v. United States, 272 U.S. 52 (1926), the President first refused to execute a statute prohibiting removal of a postmaster, and then contested

My determination that the bid protest provisions at issue should neither be defended nor executed by the Executive Branch is inextricably bound up in the substantive constitutional defects of those provisions. 2/ The new bid protest provisions, enacted as Subtitle D of the Competition in Contracting Act of 1984, are described in considerable detail in the October 17, 1984, memorandum of the Office of Legal Counsel to me on this subject, a copy of which I have enclosed with this letter, and need not be fully set forth here. As that memorandum points out, it would be plainly unconstitutional under the Supreme Court's decision in INS v. Chadha, 103 S. Ct. 2764 (1983), to vest in the Comptroller General the power to lift the "stay" automatically imposed by the CICA whenever a bid protest is filed because that action would affect the legal rights, duties, and relations of Executive Branch officials. After Chadha, the Comptroller General, as an arm of Congress, can no more be assigned veto power than can a committee of Congress. Likewise, the provisions of the CICA purporting to

1/ (Continued)

the constitutionality of that statute in the litigation arising from the removal. We have provided sufficient parenthetical information for each instance listed to describe the nature of the Executive's actions. Also, when a single issue of constitutionality of a statute has been the subject of numerous separate lawsuits, we have listed only the lead case, as with INS v. Chadha in the area of legislative veto devices and In Re Alexander Benny for the current litigation concerning the appointments provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Since the first enactment of the notification provision in 1979, § 21(a) of Pub. L. No. 96-132, 93 Stat. 1049-50, we are not aware of any decision by the Department not to execute or defend an Act of Congress which has not been the subject of an appropriate notification to Congress.

Finally, we have not included instances in which the Solicitor General determined not to appeal to the Supreme Court a lower court judgment holding an Act of Congress unconstitutional. These cases do not appear to fall within the concerns expressed in your letter because in each of them the Department defended the constitutionality of the statutes in question in the lower courts, but the Solicitor General, having considered all pertinent factors, many of which were not relevant in the lower court, decided not to pursue Supreme Court review of the adverse decision.

2/ The Executive Branch's constitutional objections to these provisions were stated clearly to Congress in a letter from this Department of April 20, 1984, to Chairman Brooks of the House Committee on Government Operations well before their enactment.

authorize the Comptroller General to assess reasonable attorneys' fees and bid preparation costs are unconstitutional. These provisions would give the Comptroller General the authority to bind the Executive Branch and therefore are clearly inconsistent with the principles of Chadha.

I turn now to the legal precedent and authority for the decision not to execute or to defend the CICA. This position is based upon the fact that in addition to the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress, the President also has a constitutional duty to protect the Presidency from encroachment by the other branches. He takes an oath to "preserve, protect and defend" the Constitution. An obligation to take action to resist encroachments on his institutional authority by the legislature may be implied from that oath, especially when he may determine it prudent to present his point of view in court. In this regard, we believe that the President must, in appropriate circumstances, resist measures which would impermissibly weaken the Presidency: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 103 S. Ct. at 2784 (emphasis added).

The President's veto power is usually adequate to express and implement his judgment that an Act of Congress is unconstitutional. By exercising his veto power, the President may fulfill his responsibility under the Constitution and also impose a check on the power of Congress to enact statutes that violate the Constitution. On some occasions, however, the exercise by the President of his veto power may not be feasible. For example, an unconstitutional provision may be a part of a larger and vitally necessary piece of legislation. The Supreme Court has held that the President's failure to veto a measure does not prevent him subsequently from challenging the Act in court, nor does presidential approval of an enactment cure constitutional defects. See INS v. Chadha, *supra*, 103 S. Ct. 2764, (1983); Myers v. United States, 272 U.S. 52 (1926).

The following words of President Andrew Johnson's counsel in an early recorded statement 3/ specifically address the President's responsibilities:

3/ Years earlier, President Jefferson, believing that Congress had no constitutional power to grant authority to the courts to control executive officers through the issuance of writs of mandamus, refused to have his Attorney General appear, except as a reluctant witness, and defend the constitutionality of a statute in the case of Marbury v. Madison, 1 Cranch 137 (1803), an original action before the Supreme Court. The Court ultimately held the statute unconstitutional.

If the law be upon its very face in flat contradiction of plain expressed provisions of the Constitution, as if a law should forbid the President to grant a pardon in any case, or if the law should declare that he should not be Commander-in-Chief, or if the law should declare that he should take no part in the making of a treaty, I say the President, without going to the Supreme Court of the United States, maintaining the integrity of his department, which for the time being is entrusted to him, is bound to execute no such legislation; and he is cowardly and untrue to the responsibility of his position if he should execute it.

2 Trial of Andrew Johnson 200 (Washington 1868). This statement, of course, was made in the context of the attempt to impeach President Johnson for, *inter alia*, having refused to obey the Tenure in Office Act, an act "which he believed with good reason . . . to be unconstitutional . . ." 38 Op. A.G. 252, 255 (1935).

This duty to preserve the institution of the Presidency, captured in the words of President Andrew Johnson's counsel, was articulated eloquently and more authoritatively by Chief Justice Chase, who presided over the trial in the Senate of President Johnson. Chief Justice Chase declared that the President has no duty to execute a statute that:

directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

* * *

How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to have passed in violation of it? 4/

4/ R. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase 685 (1874). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that the Tenure of Office Act was unconstitutional. *Id.* See M. Benedict, The Impeachment and Trial of Andrew Johnson 154-55 (1973). Ultimately, the Senate admitted evidence that the President had desired to initiate a court test of the law. *Id.* at 156.

(Emphasis in original.) If the President does not resist intrusions by Congress into his sphere of power, Congress may not only successfully shift the balance of power in the particular case but may succeed in destroying the presidential authority and effectiveness that would otherwise act as a check of Congress's exercise of power in other circumstances.

The major historical examples of refusals by the Executive to enforce or defend an Act of Congress have been precipitated for the most part by Congress's attempt to alter the distribution of constitutional power by arrogating to itself a power which the Executive believes the Constitution does not confer on Congress but, instead, reposes in him. In such situations, a fundamental conflict arises between the two Branches, and this conflict has generally resulted in Attorneys General presenting to the courts the Executive's view of what the Constitution requires. The potential for such a conflict arising was expressly recognized by Attorney General Palmer in 1919 when he opined that the general duty of the Attorney General to enforce a statute did not apply in the case of a conflict between the executive and the legislature. See 31 Op. A.G. 475, 476 (1919).

Seven years later, this exception to the general rule was applied when the President acted contrary to a statute prohibiting the removal of a postmaster. That act led to the Executive challenging successfully the Act's constitutionality in litigation brought by the removed postmaster. Myers v. United States, 272 U.S. 52 (1926). Myers appears to be the first case to reach the Supreme Court in which the Executive acted contrary to and then directly challenged the constitutionality of a federal statute in court:

In the 136 years that have passed since the Constitution was adopted, there has come before this Court for the first time, so far as I am able to determine a case in which the government, through the Department of Justice, questions the constitutionality of its own act.

Id. at 57 (condensation of oral argument for counsel for appellant Myers). 5/

5/ It is perhaps noteworthy that this condensation of the argument of appellant Myers' counsel goes on to record counsel's view that as to the appearance of the Department of Justice in opposition to the statute, "I have no criticism to offer; I think it is but proper." Further, that condensation of the oral argument does not record any observations whatsoever on this point by Senator George Wharton Pepper, who appeared as counsel for the Senate and House of Representatives as *amicus curiae*. See 272 U.S. at 65-77.

Almost a decade later, the Executive argued, unsuccessfully, that § 1 of the Federal Trade Commission Act would be unconstitutional if interpreted to prohibit the President's removal of a member of the Federal Trade Commission except for the causes set forth in the statute. Humphrey's Executor v. United States, 295 U.S. 602 (1935). Shortly thereafter, the Executive carried out, but then refused to defend when sued, and indeed successfully challenged the constitutionality of, a statute which directed that the salaries of certain federal employees not be paid. United States v. Lovett, 328 U.S. 303 (1946). ^{6/} In 1976, the Appointments Clause was once again at issue when the Executive challenged, successfully, the appointment of members of the Federal Election Commission by members of Congress. Buckley v. Valeo, 424 U.S. 1 (1976).

In addition to these examples, there have been a number of cases in which the Executive has challenged the constitutionality of legislative veto devices. See, e.g., INS v. Chadha, *supra*, 103 S. Ct. 2764 (1983). As is true of the other cases discussed above, the Chadha Court never suggested that there was any impropriety in the Executive's conduct in contesting Acts of Congress he believed trenchanted on his constitutional prerogatives.

Although I believe that the decision of Attorney General Bell to enforce the legislative veto device at issue in Chadha until held unconstitutional by the courts was not inappropriate, I note that in 1955, almost three decades before Chadha was decided, President Eisenhower instructed the Secretary of Defense to ignore another legislative veto device contained in the Department of Defense Appropriation Act, a so-called "committee approval" provision, by stating in a signing statement that that provision "will be regarded as invalid by the Executive Branch of the Government . . . unless otherwise determined by a court of competent

^{6/} The Supreme Court decided that the statute in question was unconstitutional as a bill of attainder, a constitutional defect not necessarily suggesting a clash between legislative and executive power. Because the statute was directed at subordinates of the President, however, the case took on that separation of powers characteristic both as regards the bill of attainder issue and, more specifically, with respect to the argument advanced by the employees and joined in by the Solicitor General that the statute at issue constituted an unconstitutional attempt by Congress to exercise the power to remove Executive Branch employees. See United States v. Lovett, 328 U.S. 303 (1946), Br. for United States at 10-56.

jurisdiction." Public Papers of the Presidents: Dwight D. Eisenhower 689 (1955). In 1963, President Kennedy stated that the unconstitutional features of another committee approval device would be ignored, with the provision to be treated as a "request for information." Public Papers of the Presidents: John F. Kennedy 6 (1963). President Johnson also made clear that the unconstitutional aspects of legislative veto devices would be ignored. Public Papers of the Presidents: Lyndon B. Johnson 104, 1250 (1963-64). President Johnson instructed the Secretary of Agriculture, in connection with the making of loans under an amendment to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1010-12, "to refrain from making any loans which would require committee approval." 2 Weekly Comp. Pres. Doc. 1676 (1966).

My decision that the Executive Branch would not implement or defend certain provisions of the Competition in Contracting Act is completely consistent with the Supreme Court's decision in Chadha and the publicly stated position of this Administration that the Executive would, subsequent to Chadha, observe only the constitutional "report and wait" features of legislative veto devices. 7/ This decision also had the coincidental and desirable effect of enhancing the potential for judicial review of the constitutional issues.

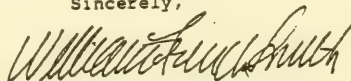
As I stated in my letter of November 21, 1984, notifying Congress that the Department had determined that federal agencies should not execute certain provisions of CICA, it is doubtful that anyone would have standing to raise the important constitutional issues presented by the disputed provisions if the Executive Branch were to execute them fully. It may be possible, as you suggest in your letter, that if the Executive Branch were to execute the disputed provisions a case might eventually arise in which a court might find that a party had standing to raise those constitutional issues. On the other hand, the disputed provisions might well never reach the courts, especially given the likelihood that such cases would become moot before judicial determination, and the Executive would then be implementing indefinitely provisions that it believes trench on the President's constitutional prerogatives. The foregoing authorities establish that the President is not required to execute such an act provisionally against the day that it is declared unconstitutional by the courts. See Myers v. United

7/ Hearings on the U.S. Supreme Court Decision Concerning the Legislative Veto, before the House Committee on Foreign Affairs, 98th Cong., 1st Sess. 52 (1983) (statement of Deputy Attorney General Schmultz).

States, supra, 272 U.S. 52. Moreover, my advice to Executive Branch agencies not to implement the disputed provisions has the beneficial byproduct of increasing the likelihood of a prompt judicial resolution. Thus, far from unilaterally nullifying an Act of Congress, the Department's actions are fully consistent with the allocation of judicial power by the Constitution to the courts.

I trust that this letter has been responsive to your concerns.

Sincerely,

A handwritten signature in dark ink, appearing to read "William French Smith", written in a cursive style.

William French Smith
Attorney General

4. February 25, 1985.--Letter from Chairman Jack Brooks to Speaker of the House Thomas P. O'Neill, Jr., requesting authorization of the General Counsel to the Clerk of the House to intervene in pending litigation.

NINETY-NINTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON GOVERNMENT OPERATIONS

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, D.C. 20515

February 25, 1985

The Honorable Thomas P. O'Neill, Jr.
 The Speaker
 U.S. House of Representatives
 Washington, D.C. 20515

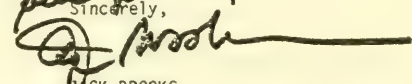
Dear Mr. Speaker:

I am writing to bring to your attention a serious matter with far-reaching implications for the House of Representatives. Last Congress, we enacted, as part of the Deficit Reduction Act of 1984, the Competition in Contracting Act, a major reform of the government's contracting process, in an effort to significantly reduce waste and abuse in Federal procurements. If properly implemented, this Act is expected to save billions of dollars each year by forcing the executive agencies to use full and open competition in their bidding process.

Although the President signed the act into law, the Administration has directed executive branch agencies to simply ignore several key provisions of the statute pertaining to bid protests on the ground that they are unconstitutional. I firmly believe that the Administration's actions are both inappropriate and illegal. The Competition in Contracting Act was duly enacted by Congress and signed into law by President Reagan in accordance with constitutional requirements. It is the law of the land. Absent a judicial determination as to the unconstitutionality of the provisions in question, Federal officials are duty bound to uphold the law.

Not surprisingly, the Administration's position has been challenged through litigation which seeks enforcement of the provisions in question. The Department of Justice, however, has chosen to vigorously attack the statute, rather than defend it. My Committee will hold hearings in the near future concerning the propriety of this unilateral abandonment of a properly enacted statute. However, I also believe that it is imperative for the House to provide the Court with an official defense of the statute. This course would be similar to that taken with respect to the Bankruptcy Amendments of 1984.

I therefore request that you authorize the General Counsel to the Clerk to intervene in the pending litigation, on behalf of the bipartisan leadership of both the House and this Committee, and to provide an official defense of this important legislative enactment.

per final
 Sincerely,

 JACK BROOKS
 Chairman

5. February 6, 1985.--Memorandum from the Congressional Research Service to the Committee on Government Operations concerning "The Executive's Duty to Enforce the Laws."



Congressional Research Service
The Library of Congress

Washington, D.C. 20540

February 6, 1985

TO : House Committee on Government Operations
Attn: Mr. James E. Rife

FROM : American Law Division

SUBJECT: The Executive's Duty to Enforce the Laws

Reference is made to your inquiry of January 15, 1985, requesting information on the above matter. Specifically, you ask for our comments regarding the authority of the President or his agents to disregard the provisions of the Deficit Reduction Act of 1984, P.L. 98-369, 98 Stat. 494 (1984), which authorize the General Accounting Office (GAO) through its head, the Comptroller General (CG), to review whether Government contracts have been properly awarded.

The provisions in question formalize the bid protest functions which prior to the law's effectiveness were handled by the GAO on the basis of authority implied from its duty to determine the legality of public expenditures. 31 U.S.C. § 3526 See United States v. Stewart, 234 F. Supp. 94, 99 (D.D.C. 1964), affd. 339 F. 2d 753 (D.C. Cir. 1964). The Justice Department objects to the provisions as conferring executive functions on a legislative officer in violation of the doctrine of separation of powers, relying principally on Buckley v. Valeo, 424 U.S. 1, 139 (1976) and INS v. Chadha, 103 S. Ct. 2764 (1983). Recently, the Director of the Office of Management and Budget (OMB) has instructed Federal agencies not to comply with the

disputed provisions of the law, which the President signed while expressing reservations about their constitutionality.

Although the bid protest features of the law and their constitutionality give rise to the issue posed at the outset, these matters need not be analyzed extensively here. Both points have been covered at considerable length in various sources including our own memorandum of August 8, 1984. The latter concluded that the functions conferred on the CG by the challenged provisions are essentially executive in nature but that the CG, both in the manner of appointment and in light of other unquestionably executive functions which he is legally authorized to perform, is an executive officer for certain purposes. See 2 U.S.C. §§ 686-687 and 31 U.S.C. § 716 which give the CG civil litigating responsibilities. See, also, Buckley v. Valeo, 424 U.S. 1, 140 (1976) where the Supreme Court states that "... responsibility for conducting civil litigation in the courts of the United States for vindicating public rights ... may be discharged only by persons who are 'Officers of the United States'." Our conclusions in the mentioned regards rested on various grounds including a 1960's lower federal court ruling almost squarely on point involving antecedent bid protest procedures, United States v. Stewart, 234 F. Supp. at 99-100, and an observation by the Supreme Court in Buckley v. Valeo, 424 U.S. at 128, note 165, that strongly suggests that the CG is an executive officer "irrespective of Congress' designation."

Another reason for foregoing any prolonged discussion of the operation of the controversial bid protest provisions and their constitutional merits or shortcomings is that these matters only have incidental relevance to the instant issue, namely whether the President has the right to refuse to execute a law because he deems it unconstitutional. Stated differently,

this issue is not dependent on the particular facts of the case under consideration, but would exist whenever any President refuses on the basis of constitutional reservations to implement a statutory scheme or to carry it into effect.

Similarly, it seems unnecessary to dwell on the roles or the intermediateship of the Attorney General and OMB Director in these circumstances. To the best of our knowledge, neither official has any authority independent of the President to refuse to implement or to carry a statutory enactment into effect based on personal reservations regarding that law's constitutionality. It seems rather late in the day to challenge the "principle" that "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. Johnson v. Robison, 415 U.S. 361, 368 (1974) (Veterans' Administration). See Public Utilities Comm'n v. United States, 355 U.S. 534, 539 (1958); Engineers Public Service Co. v. SEC, 78 U.S. App. D.C. 199, 215-216, 138 F. 2d 936, 952-953 (1943), dismissed as moot, 332 U.S. 788.' Oestereich v. Selective Service Board, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result); see Jaffe, Judicial Review: Questions of Law, 69 Harv. L. Rev. 239, 271-275 (1955)". In the present circumstances, these officials are operating as agents of the President who, presumably, relies on his executive powers generally (Art. I, § 1) and, particularly, on powers perceived as flowing from the constitutional provision that "he shall take care that the laws be faithfully executed" (Art. II, § 3) to disregard the congressional will.

Also before proceeding to an appraisal of the fundamental issue raised by the OMB's December 17, 1984 instruction to the Federal agencies, it seems appropriate to isolate that issue from subsidiary or ancillary matters not directly or indirectly implicated. For example, the propriety of the President requiring and the heads of departments supplying him with written opinions on any subject relating to their duties is beyond question. Art. II, § 2. cl. 1. Similarly, the longstanding practice of the Justice Department of interpreting a vague or ambiguous statute for the guidance of the Executive Branch has an honored if not express constitutional basis in the scheme of things. That interpretation is persuasive insofar as Federal agencies are concerned until Congress by law or the courts by decision effectively provide otherwise. It is equally clear that an "attorney for the United States ... as an officer of the executive department exercises a discretion as to whether or not there shall be a prosecution in a particular case." United States v. Cox, 342 F. 2d 167, 171 (5th Cir. 1965), cert. den. 381 U.S. 935 (1965). Neither the courts nor Congress can interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions. Ibid. Likewise beyond dispute is the authority of the President to communicate his stand against the passage of laws and the vetoing of laws he believes to be unconstitutional. Art. II, § 3, Art. I, § 7, cl. 3. It is at these stages in the legislative process that the President may take a stand on the constitutionality of measures which stand the courts have indicated is entitled to consideration by the other two branches. "In the performance of assigned constitutional

duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." United States v. Nixon, 418 U.S. 683, 703 (1974). (Emphasis added.)

Notice also may be taken of the fact that Congress may pass laws of varying degrees of obligatory force relative to compliance by the department official to whom they are addressed and conferring or withholding discretion in matters of implementation and execution. The former almost invariably are described as mandatory or directory provisions; duties imposed by the latter are frequently characterized by such polar terms as ministerial or discretionary duties. In brief Congress can fashion legislation whereby compliance is a matter of convenience rather than necessity and impose duties the discharge of which call for the exercise of no or some discretion. For a general treatment of Mandatory Statutes, see, generally, 1 A Sutherland Statutory Construction [Sands ed.] at §§ 25.02-25.04. See, e.g., Train v. City of New York, 420 U.S. 35 (1975), regarding ministerial and discretionary duties.

All of the foregoing matters are true and interesting but irrelevant insofar as the problem considered here is concerned. The refusal to implement the bid protest provisions of the law, as best we can determine, rests ultimately on an assertion of an assumed presidential power. In other words, prosecutorial discretion, the distinction between mandatory or directory statutes and ministerial or discretionary duties, and any of the previously mentioned matters are not involved here. See, for example, the House Conference Report's implicit rejection that the formalized bid protest function may be implemented or executed either at the convenience or discretion of

affected officials, including the CG, to wit: In order "to insure that the mandate for ['full and open'] competition is enforced and that vendors wrongfully excluded from competing for government contracts receive equitable relief", Subtitle D of P.L. 98-368 codifies and strengthens "the bid protest function currently in operation at the General Accounting Office (GAO)." H. Conf. Rept. No. 98-861 at 1435. While the law confers some discretion on the CG and other officials, e.g., extending the time which an agency has to respond to a protest (§ 3553(a)(2)(B), permitting an executive agency to go ahead and award a contract in compelling circumstances (§ 3553(c)(2), etc., these conferrals go to the manner of execution, not to whether the law should be implemented.

The Administration's position on the bid protest provisions of the law is neither unprecedented nor unparalleled. Although there has been no consistent pattern of behavior with respect to the implementation or execution of laws various Presidents considered to be unconstitutional, some Executives have declared an intent to disregard law on these grounds. In apparent frustration over congressional proliferation of the legislative veto device to control executive action, President Carter stated that he would "give [congressional concern] serious consideration, but we will not under our reading of the Constitution, consider it legally binding." 124 Cong. Rec. H. 5880 (daily ed. June 21, 1978).

President Jackson in 1832 vetoed a bill providing for a recharter of the National Bank on the ground of unconstitutionality notwithstanding that in the case of McCulloch v. Maryland, 4 Wheat. 17 U.S.) 316 (1819), this institution was held constitutional. In support of his action, Jackson in his veto message said: "The Congress, the Executive, and the

Court, must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Court when it may be brought before them for a judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the Judges, and on that point the President is independent of both." Willoughby, 3 The Constitutional Law of the United States 1502 (1929).

Another well known instance of a presidential refusal to execute the law, albeit decisional rather than statutory law, was the refusal to release Merryman from confinement in disobedience to a writ of habeas corpus issued by Chief Justice Taney while on circuit. "The officer in charge of the prisoner having declined to obey the writ on the ground that he was authorized by the President to suspend the writ of habeas corpus for the public safety, Taney at once issued an attachment for contempt. Its service ... [was] prevented by the military, ..." Warren, 2 The Supreme Court in United States History 368-369 (1926). See, Douglas, J., concurring, Youngstown Co. v. Sawyer, 343 U.S. 579, 631 note 1 (1952).

However, a number of Presidents have yielded to the legislative will despite serious constitutional misgivings. Thus, for example, President Roosevelt, while condemning as "unwise and discriminatory [and] unconstitutional" a rider to an appropriations bill forbidding the use of money appropriated therein to pay the salaries of three named persons whom the

House of Representatives wished discharged because they were deemed to be "subversive", submitted to the legislative will. See United States v. Lovett, 3228 U.S. 303 (1946), where the provision was held to be a bill of attainder. On the other hand, President Andrew Johnson refused to be bound by the Federal Tenure of Office Act and discharged Secretary of War Stanton contrary thereto. His subsequent impeachment largely rested on this action which it was contended constituted a violation of the constitutional duty to "take care that the laws be faithfully executed."

The Jackson precedent is distinguishable from the present situation since his alleged flouting of the law occurred in justifying his exercise of a veto, not in defiance of a validly enacted and effective law.

The mentioned FDR and Andrew Johnson precedents, in our view, are more in accord with the dictates of the separation of powers principle. The former allowed for resolution of the constitutional question in the judicial forum; the latter effectively and not without some inkling of the likely consequences, allowed his impeachment trial to clarify the congressional intent behind the Federal Tenure of Office Act.

The fact that other Presidents have refused on the basis of personal constitutional scruple to implement a law is not determinative of the constitutionality of either those or current actions. "That an unconstitutional action has been taken before surely does not render the same action any less unconstitutional at a later date." Powell v. McCormack, 395 U.S. 486, 547 (1969).

In the absence of a fundamental change in the scheme of government devised by the Framers and barring any change in directions clearly stated or implied by the Supreme Court, it would appear that such broad claims to power as are

implied by the December 17, 1984 OMB instructions to the Federal agencies cannot be sanctioned "without reading Article II as giving the President not only the power to execute the laws but to make [and unmake] some." Douglas, J., concurring, Youngstown Co. v. Sawyer, 343 U.S. at 633.

Any doubts concerning the Supreme Court's readiness to enforce the principle of separation of powers when its application proves necessary for a decision, should have been dispelled by Buckley v. Valeo, 424 U.S. at 120 et seq., and INS v. Chadha, 103 S. Ct. at 2784 et seq. Congressional attempts to depart from the manner for appointing executive officers and to legislate prescribed by Art. II, § 2, cl. 2 and Art. I, § 7, cl. 2, respectively, were overturned as being inconsistent with the principle which separates legislative, executive and judicial powers. Although both cases involved congressional overreaching, the Court's earlier decision in Youngstown v. Sawyer, 343 U.S. at 579 et seq., and recent remarks have served notice on all "that each Branch of government [has to] confine itself to its assigned responsibility ... [and that any attempt] of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 103 S. Ct. at 2784.

The separation of powers describes the division of governmental powers into functional categories, legislative, executive and judicial and their distribution among the three Branches of Government. Although the principle admits of some admixture to permit the government to operate cooperatively, Buckley v. Valeo, 424 U.S. at 121, each Branch must act within its assigned sphere. Accordingly, "the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power." Springer v. Philippine Islands, 277 U.S. 189, 201-202 (1928).

Is it part of the executive power to make the laws? Does either the grant of executive authority or the obligations imposed by the Take Care Clause permit the President to suspend the law? Do any of these sources of presidential power admit of authoritative executive determinations as to what the Constitution ultimately means? These questions, or so it seems, virtually answer themselves.

According to a 1915 brief of the then Solicitor General of the United States, "[t]he function of making laws is peculiar to Congress, and the Executive cannot exercise that function to any degree." Quoted by Vinson, C.J., dissenting, Youngstown Co. v. Sawyer, 343 U.S. at 690. The Court in that case held that the President may not execute and exercise legislative authority belonging only to Congress. In the course of its opinion, the Court said:

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which it is to execute. The first section of the first article say that "All legislative Powers herein granted shall be vested in a Congress of the United States" 343 U.S. at 587-588.

A few paragraphs later, the Court observed that the lawmaking power was in no way subordinated to the executive power and that the latter embraced no element of the former regardless of conditions or circumstances.

... The Constitution does not subject this lawmaking power of Congress to presidential ... supervision or control.

...

The Founders of this Nation entrusted the lawmaking power to Congress alone in both good and bad times. 343 U.S. at 588-589.

Similar expressions can be found in the individual views of other justices who considered President Truman's unauthorized seizure of the steel mills as effective lawmaking. For Justice Douglas, "[t]he power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate." 343 U.S. at 632. Justice Jackson observed that "[t]he Executive, except for recommendation and veto, has no legislative power." 343 U.S. at 579.

The power to execute the law starts and ends with the laws Congress has enacted. The nature of the authority conferred by the Take Care Clause was comprehensively stated by Justice Holmes. "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." Myers v. United States, 272 U.S. 52, 177 (1926).

The refusal of the President to execute the law is indistinguishable from the power to suspend the laws. That power, as is true of the power to amend or to revive an expired law, is a legislative power. A grant of immunity from prosecution is a typical example of suspension of the laws and it involves the enactment of a law. (Unlike a grant of immunity from prosecution, a presidential pardon does not suspend a law, but exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. United States v. Wilson. 7 Pet. (32 U.S.) 150, 160 (1833).)

The legislative nature of the action taken by the Administration in instructing the Federal agencies to disregard the bid protest provisions of

the law seems clear. In so doing the President has effectively suspended its operation across the board, an action which entails lawmaking. Moreover, in presuming to act in this manner because of the law's asserted unconstitutionality, the President arguably has violated the separation of powers by intruding into the judicial sphere. "... [i]t is emphatically the province and duty of the judicial department to say what the law is." United States v. Nixon, 418 U.S. at 705, citing Marbury v. Madison, 1 Cranch 137 (1803).

As previously noted, "[i]n the performances of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect by the others." United States v. Nixon, 418 U.S. at 706. However,

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. II, § 1, of the Constitution can be no more shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. 418 U.S. at 714.

Lest the implications of these remarks escape notice, the Court negated the notion that "in any sense [is] a President above the law ..." United States v. Nixon, 418 U.S. at 715.

The courts have rejected the assertion that the President has any inherent power to deny the execution of laws imposing purely ministerial duties, such as halting congressionally authorized expenditures. Kendall v. United States, 12 Pet. (37 U.S.) 524 (1838). That case involved an order by Congress to the Postmaster General to pay a claimant whatever amount an outside arbitrator should decide was the appropriate settlement.

Presented with a decision by the arbitrator in a case arising out of a claim for services rendered to the United States in carrying the mails, President Jackson's Postmaster General ignored the congressional mandate and paid a lesser amount. The Supreme Court noting the ministerial nature of the act involved, held that a writ of mandamus could issue directing the Postmaster General to comply with the congressional directive. In reaching this conclusion, the Court held that the President, and thus those under his supervision, did not possess inherent authority whether implied by the Take Care Clause or otherwise, to deny funds that Congress had ordered to be spent. "To contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible." 37 U.S. at 611.

In line with the Kendall decision is the series of consistent rulings overturning efforts by the Nixon Administration to prevent the spending of appropriated funds. Termed an impoundment, this effective substitution of presidential policy choices regarding spending for those established by congressional appropriations was justified as part and parcel of the President's authority to see to the faithful execution of the law. The courts denied that the President had either constitutional or statutory power to decline to spend or obligate funds. The Supreme Court ruled on purely statutory grounds, holding that no discretion existed under the particular statute to withhold allotments of funds to the states. See Train v. City of New York, 420 U.S. 35 (1975); Train v. Campaign Clean Waters, 420 U.S. 136 (1975). See also State Highway Comm. of Missouri v. Volpe, 479 F. 2d 1099 (8th Cir. 1973); Commonwealth of Pennsylvania v.

Lynn, 501 F. 2d 848 (D.C. Cir. 1974). Local 2677, American Fed. of Gov. Emp. v. Phillips, 358 F. Supp. 60 (D.D.C. 1973). Expressly or impliedly, the courts in these cases rejected the claim of "inherent constitutional power in the Executive to decline to spend in the face of a clear statutory intent and directive to do so." National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D.D.C. 1973). It follows that if Congress can by eliminating discretion prevent administrative refusals to implement or carry statutes into effect, executive claims to the contrary cannot be constitutionally based. To view the matter otherwise is to suggest that Congress can amend the Constitution by statute.

A noted constitutional scholar of the twenties and thirties analyzed whether the President has the right to refuse to execute a law because he regards it as being unconstitutional. In clear and unmistakable language, Professor Willoughby described an executive refusal on these grounds as "arrogating to himself controlling legislative functions, and [leaving laws] ... but an advisory, recommendatory character, depending for power upon the good-will of the President." His remarks in this regard follow:

Whether the President has the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional, is an entirely different question from that just considered. Here the President has to deal not with a measure in the process of enactment, as is the case when the veto is exercised, but with a bill that has passed through all the constitutional forms of enactment, and has become a law, and it would seem that he has no option but to enforce the measure. The President has not been given the power to defeat the will of the people or the legislature as embodied in law. The reasons for maintaining a contrary opinion, as usually stated, are these: The Constitution of the United States is the supreme law of the President as well as of the private citizen. It is his duty to "take care that the laws be faithfully executed," but he

is also sworn to "preserve, protect and defend the Constitution," and this he must do upon his own interpretation of the Constitution, and not upon that of others. The Constitution is but a law of high degree, and is, therefore, one of the very laws that he must take care are faithfully executed. Says one writer: "If the President must execute all laws, he must execute an *ex post facto* law or any other law flying in the teeth of the constitution; a partisan statute passed over his veto can rob him of the right to be commander-in-chief, to nominate or remove from office, or of any other right expressly conferred upon him, and it is at once evident that in these cases Congress would be quite as plainly taking away from the President the power which the constitution has expressly given. A two-thirds majority could alter at will many important provisions of the constitution, and the members could only be called to account at a reelection. That instrument in these cases would not be self-supporting, and would furnish none of those checks of which we have all heard so much. But if the contrary view is true, the check system comes into perfect play; for then the President's right to refuse his assistance to an unconstitutional law will check Congress, while the risk of impeachment will check the President."

The errors in this argument are sufficiently plain. In the first place, the President does not stand upon the same footing as regards the Constitution, as does the private citizen. The President is an agent selected by the people, for the express purpose of seeing that the laws of the land are executed. If, upon his own judgment, he refuse to execute a law and thus nullifies it, he is arrogating to himself controlling legislative functions, and laws have but an advisory, recommendatory character, depending for power upon the good-will of the President. That there is danger that Congress may by a chance majority, or through the influence of sudden great passion, legislate unwisely or unconstitutionally, was foreseen by those who framed our form of government, and the provision was drawn that the President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of the Chief Executive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law.

It is the duty or privilege of a private citizen to refuse obedience to a law, if, upon careful consideration and investigation, he considers it to be unconstitutional, but he does so at his own risk, and if he is wrong he must abide by the legal consequences. Then, too, only his particular interest is directly involved. If, however, it be said that the President also refuses his obedience at his own risk, namely, the danger of impeachment and possible subsequent civil or criminal prosecution, the reply is that, in the

first place, a refusal on his part to execute the law nullifies it in all its applications for all people; and in the second place, that impeachment is not a check. As an instrument for checking unconstitutional action on the part of the President, impeachment has been found too cumbersome. If, in the case of the extreme opposition and contest between both Houses of Congress and President Johnson, an impeachment was not successful, it must be admitted that as a means of future restraint upon the Chief Executive it will not be greatly feared.

That the President and all other officers of the government have not the right to refuse obedience to a judgment of the Supreme Court, because he or they believe such judgment to be based upon an incorrect interpretation of the Constitution, scarcely needs argument. This case is stronger than the former one by the additional support of the judiciary. To refuse now to execute the command of the court is to assume the judicial power of a court of appeals as well as legislative functions.

Raymond J. Celada
Raymond J. Celada
Senior Specialist In
American Public Law

6. February 5, 1985.--Letter from Honorable Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary, to Chairman Jack Brooks expressing that committee's concern over the determination of the Department of Justice that Federal agencies not execute the bid protest provisions of the Competition in Contracting Act and enclosing copies of letters to the Attorney General and the Speaker of the House.

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515

Ninety-ninth Congress

February 5, 1985

RECEIVED
 FEB 7 1985
 HOUSE COMMITTEE ON
 GOVERNMENT OPERATIONS

Honorable Jack Brooks
 Chairman
 Committee on Government Operations
 Washington, D.C. 20515

Dear Jack:

As you are aware, on November 21, 1984, the Attorney General notified the Congress that the Department of Justice had decided to refrain from defending certain bid protest provisions of the Competition in Contracting Act of 1984, which originated in the Government Operations Committee and which was enacted as part of the Deficit Reduction Act of 1984, Public Law No. 98-369. The basis of this decision was that the Attorney General had determined that these provisions are unconstitutional. This notice also stated that the Department had determined that federal agencies should not execute these same bid protest provisions.

I am deeply concerned about the Department's determination that agencies should not comply with a statute, even though there has been no judicial determination regarding its constitutionality. Consequently, I have written the Attorney General to inform him that the Judiciary Committee intends to carefully examine the Department position during authorization hearings this year. We also intend to use these hearings to examine the practice of the Department in refraining from defending certain statutes and the frequency with which it does so.

Enclosed for your information is a copy of my letter to the Attorney General on this matter. Also enclosed is a copy of my letter to the Speaker of the House, requesting that the Judiciary Committee be informed of all future notices from the Attorney General regarding the Department's refusal to defend or refusal to comply with any statute. This will allow the Committee to carry out its responsibilities in overseeing the Department of Justice.

I look forward to working with you on this important issue.

Sincerely,


 PETER W. RODINO, JR.
 Chairman

Enclosures
 PWR/jpc

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515

Ninety-ninth Congress

January 31, 1985

The Speaker of the House
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

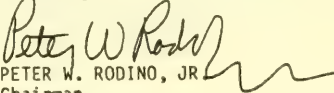
I recently learned of the November 17, 1984, letter from the Attorney General to the House of Representatives stating that the Department of Justice will refrain from defending and will direct the Executive Branch to refuse to execute certain bid protest provisions of the Competition in Contracting Act of 1984, which was enacted as part of the Deficit Reduction Act of 1984, Public Law No. 98-369, 98 Stat. 494 (1984).

The letter from the Attorney General raises important constitutional issues of separation of powers for the Committee, and the entire Congress, to consider. For your information, I am enclosing a copy of my letter to the Attorney General regarding this matter.

It is the responsibility of the Judiciary Committee, through its oversight and authorization process, to examine and evaluate the operations of the Department of Justice, and to ensure that the Department is faithfully executing the law. The Committee intends to explore the issues raised by the Attorney General's letter during its authorization hearings this year and to continue to monitor this situation in the future. Thus, it is important that the Committee be apprised of any future cases in which the Attorney General notifies the House that the Department will not defend a statute, or that the Department will direct agencies to refuse to execute a statute.

Therefore, I hereby request that in the future you forward to this Committee a copy of any such notifications by the Attorney General to the House. This will allow the Committee to carry out its responsibilities in overseeing the Department of Justice.

Sincerely


PETER W. RODINO, JR.
Chairman

Enclosure
PWR/jpc

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515

Ninety-ninth Congress

January 31, 1985

Honorable William French Smith
Attorney General
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

On November 21, 1984, you submitted a notification to the Speaker of the House pursuant to Section 203(a) of Public Law No. 98-411, 98 Stat. 1545, by continuing the authorities contained in Section 21 of Public Law No. 96-132, 93 Stat. 1049-50.

This notification stated that the Department of Justice will refrain from defending certain bid protest provisions of the Competition in Contracting Act of 1984 (enacted as part of the Deficit Reduction Act of 1984, Public Law No. 98-369) in any court, administrative or other proceeding in which execution of the provision is sought. This decision was based on the Department's conclusion that these bid protest provisions are unconstitutional.

Your notification further stated that the Department has determined that federal agencies should not execute these bid protest provisions of the Competition in Contracting Act of 1984 (CICA). Pursuant to this determination by the Department, on December 17, 1984, the Office of Management and Budget issued Bulletin No. 85-8, which informed all Executive Branch agencies and departments that they should not comply with the bid protest provisions of the CICA.

I am deeply concerned about the position the Department has taken in directing agencies to ignore certain provisions of the CICA on the grounds that these provisions are unconstitutional.

To quote the Memorandum for the Attorney General, which was attached to your letter to the Speaker:

The division of delegated powers was designed "to assure, as nearly as possible that each Branch of Government would confine itself to its assigned responsibility." INS. v. Chadha, 103 S. Ct. at 2784. This division obliges the branches both to confine themselves to their constitutionally prescribed roles and not to interfere with exercise by the other branches of their constitutional duties. Thus, the doctrine of separation of powers "may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." Id. at 2790 (Powell, J. concurring) (citations omitted).

The doctrine of separation of powers applies to the Executive Branch no less than the Legislative Branch. Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579, 587-588 (1952). Under this doctrine, only the courts have the authority to finally interpret the Constitution. United States v. Nixon, 418 U.S. 683, 704 (1974).

It is clearly a Department function to make an initial interpretation of the terms and application of a statute. It is quite another matter for the Department, on behalf of the President, to direct agencies to refuse to comply with that statute. "To contend, that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." Kendall v. the United States, 12 P.L. (37 U.S.) 524, 613 (1838).

In this particular instance, the responsibility of the Executive Branch to comply with the CICA pending a judicial determination of constitutionality is thrown into stronger light because of the President's own actions. Here the President stated that certain provisions of the CICA were unconstitutional at the very time that he signed the act in which they were contained (Statement on Signing H.R. 4170 Into Law, July 18, 1984). While it would have been wholly appropriate for the President to veto the act on the grounds that portions of it were unconstitutional (in fact, it could be argued that it was his constitutional duty to veto such an act), it is an entirely different matter for the President to determine a bill is unconstitutional, sign that bill into law, and then refuse to comply with that law's provisions on the ground that it is unconstitutional.

A unilateral Executive Branch decision to rule a statute unconstitutional and to refuse to comply with it on the basis of that ruling is a usurpation of a judicial power and a failure by the President to properly exercise his own constitutional duty to "take care that the Laws be faithfully executed." U.S. Constitution, Article II, Section 3. Until a judicial determination on the constitutionality of a statute, it is the responsibility of government officials, no less than average citizens, to comply with that statute.

Your notification of November 21, 1984, states that one of the purposes of Executive Branch refusal to comply with the CICA is to assure expeditious determination of its constitutionality by the courts. You assert that "it is doubtful that anyone would have standing to raise these constitutional issues if the Executive Branch fully executed the subject provisions.". It is true that judicial consideration of important constitutional issues can be delayed because of difficulty in bringing such issues quickly before the courts (as was the case with legislative veto for a number of years). However, an aggrieved bidder would have standing to challenge the constitutionality of the CICA if a stay were imposed due to the filing of a protest (See Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 859 (1970)). Also, any contract bidders could seek a determination of constitutionality of the CICA under the Declaratory Judgment Act, 28 U.S.C. 2201 and 2202. In either situation, the Department of Justice could intervene to raise the issue of the CICA's constitutionality.

It is the responsibility of this Committee, through its oversight and authorization process, to examine and evaluate the operations of the Department of Justice, and to assure that the Department is faithfully executing the law. As discussed above, your letter to the Speaker regarding your position on the CICA, and the directions you have issued to the Executive Branch regarding its implementation, raise serious issues for the Committee to examine as it prepares for authorization hearings this spring.

Therefore, I hereby request that you provide a full report to the Committee by February 15, 1985, on the legal precedent and authority for the Department of Justice to direct agencies to refrain from complying with a statute and a list of all statutes regarding which the Department has issued such directions.

I am also concerned about the Department's refusal to defend certain statutes. The provision pursuant to which the Department notifies Congress of such a refusal was in no way intended to ratify that practice. (See Debates on Amendments by Mr. Levitas, Congressional Record, September 28, 1978, p. 32423 et. seq., and Congressional Record, October 16, 1979, p. 28475 et. seq.) The Committee also intends to address this issue in the authorization hearings.

Therefore, I further request that by February 15, 1985, you submit a separate report on the legal precedent and authority for the Department of Justice to refrain from defending the validity of a statute. This report should include: 1) a full list of those statutes which the Department has refused to defend; 2) the precise grounds for the refusal regarding each statute; 3) the date on which each case regarding any such statute was filed; 4) the date on which Congress was notified of each case; and 5) each case, if any, of which the Congress was not notified.

Sincerely,

PETER W. RODINO, JR.
Chairman

PWR/jpc

7. January 19, 1985.--Letter from Deputy Director Joseph R. Wright, Jr., Office of Management and Budget, to Chairman Brooks.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

January 19, 1985

RECEIVED

JAN 24 1985

Honorable Jack Brooks
Chairman
Committee on Government Operations
U.S. House of Representatives
Washington, D.C. 20515

HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

Dear Jack:

I am writing in response to your letter to the Director of January 8, 1985 concerning OMB's issuance of a Bulletin implementing the opinion of the Department of Justice that certain provisions of the Competition in Contracting Act of 1984 were unconstitutional.

On July 18, 1984, the President, in signing the Competition in Contracting Act, issued a statement questioning the constitutionality of several provisions of the Act which ostensibly authorized the Comptroller General to bind Executive Branch agencies concerning certain aspects of the bid protest process. The President requested that the Attorney General advise Executive agencies how to comply with the Act in a manner consistent with the Constitution.

On October 17, 1984, the Department responded to the President's request by issuing an opinion which concluded that several provisions of the Act were unconstitutional. The Department concluded that the Comptroller General, as a Legislative Branch official, could not exercise these Executive Branch authorities consistent with the Constitution, as recently interpreted by the Supreme Court. The Department therefore concluded that these three sections must be stricken from the Act.

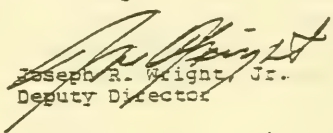
Section 203(a) of Pub. L. No. 98-411, 98 Stat. 1545, by continuing the authorities contained in Section 21 of Pub. L. No. 96-132, 93 Stat. 1049, requires that the Attorney General transmit a report to each House of Congress in any case in which he determines that the Department of Justice "will contest, or will refrain from defending, any provision of law enacted by Congress" in any administrative or judicial proceeding, because of the Department's conclusion that the provision is not constitutional. On November 21, 1984, the Attorney General duly notified the Speaker of the House and the President of the Senate pursuant to the provision that the Department would not defend these provisions in any proceeding in which their enforcement was sought. The Attorney General also stated that his position would facilitate prompt judicial consideration of the constitutional issues. Indeed, the Attorney General noted that this approach

might be the only manner in which the Judicial Branch could resolve these questions, because other persons would not have standing to raise these constitutional issues if the Executive Branch fully executed those provisions.

The opinions of the Attorney General interpreting the law are, of course, binding upon all Executive Branch agencies, including OMB. Pursuant to various statutes and Executive Orders, OMB is charged with supervising and coordinating the activities of the Executive agencies, in order to provide for the effective implementation and management of its programs. At the request of the Department of Justice, and in order to provide for coordination of the activities of Federal agencies in this dispute and facilitate a prompt judicial resolution of the constitutional question, on December 17, 1984, the Director issued Bulletin No. 85-8 to the Heads of Executive Departments and Agencies. That Bulletin informed the agencies of the Department of Justice's legal opinion and reminded them of their obligation to conduct their contracting authority in conformance with the Department's legal advice. The Bulletin also established reporting requirements, so that the Department of Justice would be notified of the initiation of any litigation challenging the Department's interpretation of the Act.

The issuance of the Bulletin was accordingly in keeping with OMB's responsibility to follow the legal advice of the Attorney General. We fully share the Attorney General's position that a determination not to defend provisions of law enacted by Congress is always a most sensitive determination, to be made with full realization of the separation of power implications of such decisions, and in strict conformance with the reporting provisions established by Congress for handling such extraordinary matters. We also share the Attorney General's views that a prompt judicial determination of the constitutionality of these provisions is highly desirable and that the position taken by the Attorney General is the most appropriate means of ensuring judicial resolution of the constitutional issues in a timely fashion.

Sincerely,


 Joseph R. Wright, Jr.
 Deputy Director

8. January 15, 1985.--Federal Acquisition Circular 84-6 to all Federal departments and agencies containing revisions to the Federal Acquisition Regulation.



General
Services
Administration

Office of
Acquisition
Policy

Washington, DC 20405

January 15, 1985

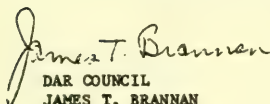
ALL FEDERAL DEPARTMENTS AND AGENCIES

SUBJECT: FAR BULLETIN NO. 1 -- FAC 84-6, Publicizing Proposed Regulations; Proprietary Data Restrictions; Protest Provisions of the Competition in Contracting Act of 1984

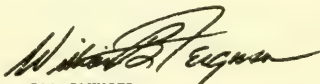
On January 10, 1985, the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration approved Federal Acquisition Circular (FAC) 84-6 containing various revisions to the Federal Acquisition Regulation.

The Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council have determined that an urgent need exists to distribute the approved FAR revisions as expeditiously as possible. The Councils are, therefore, distributing the attached temporary revisions on an advance basis. The extent of further distribution of these materials is within the individual discretion of each addressee. Replacement pages for the loose-leaf edition of the FAR will be distributed in the near future.

The revisions distributed by this FAR Bulletin are effective upon receipt unless a later date is specified for a particular item.


DAR COUNCIL

JAMES T. BRANNAN
Director
Defense Acquisition
Regulatory Council



CAA COUNCIL
WILLIAM B. FERGUSON
Chairman
Civilian Agency
Acquisition Council

Enclosure



FEDERAL ACQUISITION CIRCULAR

January 10, 1985

Number 84-6

Federal Acquisition Circular (FAC) 84-6 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

The material contained in FAC 84-6 is effective according to the following:

- The revisions to the Federal Acquisition Regulation (FAR) described in Item I, Publicizing Proposed Regulations, are effective November 29, 1984.
- The revision to the FAR described in Item II, Validation of Proprietary Data Restrictions, is effective for solicitations issued by civilian agencies other than NASA on or after December 29, 1984.
- The revisions to the FAR described in Item III, Protest Provisions of the Competition in Contracting Act of 1984, are effective for protests filed on or after January 15, 1985.
- The revision to the FAR described in Item IV, Editorial, is effective January 15, 1985.

<u>ITEM</u>	<u>TITLE</u>	<u>PAGE</u>
I	Publicizing Proposed Regulations	3
II	Validation of Proprietary Data Restrictions	3
III	Protest Provisions of the Competition in Contracting Act of 1984	3
IV	Editorial	4

ITEM I PUBLICIZING PROPOSED REGULATIONS

The Small Business and Federal Procurement Competition Enhancement Act of 1984 (Public Law 98-577) requires that certain acquisition regulations receive public comment. The changes to FAR Part 1 conform the regulation to these publicizing provisions. Under this new coverage, agencies will be required to publicize acquisition regulations that have a significant effect beyond the internal operating procedures of the agency or have a significant cost or administrative impact on contractors or offerors. Such coverage may not take effect until 30 days after a notice (see 1.501-2(b)) inviting public comment is placed in the Federal Register unless the issuing officer waives the advance comment requirement after determining that urgent and compelling circumstances make such action impracticable. This item does not address any of the provisions of the Act except for publicizing of proposed regulations. With the exception of Item II of this FAC, other provisions of the Act will be implemented in separate FAC's.

Replacement pages, when distributed, will correspond with the attached pages 3-7.

ITEM II VALIDATION OF PROPRIETARY DATA RESTRICTIONS

Section 203 of Public Law 98-577 amended the Federal Property and Administrative Services Act of 1949 by adding coverage on validation of restrictions asserted by a contractor or subcontractor on the right of the Government to use technical data. FAR 27.401 is amended to require civilian agencies other than NASA to implement Section 203 of Public Law 98-577 pending the publication of detailed coverage on this subject in a later FAC.

Replacement page, when distributed, will correspond with the attached page 11.

ITEM III PROTEST PROVISIONS OF THE COMPETITION IN CONTRACTING ACT OF 1984

The Competition in Contracting Act of 1984 provides revised procedures for filing protests with the General Accounting Office (GAO) and new procedures for filing Automatic Data Processing protests to the General Services Board of Contract Appeals (GSBCA). These protest procedures apply to protests filed on or after January 15, 1985.

FAR Parts 12, 14, 33, and 52 contain new protest coverage.

Under the new coverage, agencies will be required to implement procedures for processing protests that are filed with the GAO and with the GSBCA. The protest coverage of the FAR is removed from Subpart 14.407-8 and the revised coverage is placed in Subpart 33.1. The Disputes and Appeals coverage of Part 33 is renumbered as Subpart 33.2.

This item only addresses CICA's protest provisions. Other CICA coverage is contained in FAC 84-5.

Replacement pages, when distributed, will correspond with the attached pages 1, 2, 8-10, 12-18, and 20-22.

ITEM IV EDITORIAL

The reference in FAR Part 39 is corrected to read "Chapter 201 of Title 41 of the Code of Federal Regulations".

Replacement page, when distributed, will correspond with the attached page 19.

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SUBPART 14—DEVIATIONS FROM THE FAR

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MAC-34-1 MARCH 26, 1964

1.202 Agency compliance with the FAR.

Agency compliance with the FAR (see 1.304) is the responsibility of the Secretary of Defense for the military departments, the Administrator of NASA, the Director of General Services (for civilian agencies other than NASA), and the Administrator of NASA (for NASA activities).

SUBPART 1.3—AGENCY ACQUISITION
REGULATIONS

1.301 Policy.

Subject to the authorities in (c) below and other

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statutory authority and, except as stated in 1.301(c) below, an agency head may not authorize the issuance of agency acquisition regulations that differ from the FAR. The FAR shall be published together with the FAR, agency rules, policies, procedures, contract clauses, and solicitation provisions that govern the contracting process or otherwise control the relationship between the agency and its contractors. Agency rules, policies, procedures, and contract clauses shall be published in the Federal Register as required by law.

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(c)

FEDERAL ACQUISITION REGULATION (FAR)

(c) Any deviation from the FAR required to comply with an executive agreement is authorized unless the deviation would be inconsistent with FAR coverage Federal law.

(d) A copy of the text of any deviation authorized under paragraphs (b) or (c) of this section shall be transmitted to the FAR Secretariat through a central agency control point.

(e) If a deviation required to comply with a treaty or an executive agreement is not authorized by paragraphs (b) or (c) of this section, then the request for deviation shall be processed through the FAR Secretariat to the appropriate council

SUBPART 1.3—AGENCY AND PUBLIC PARTICIPATION

1.301 Solicitation of agency and public input.

~~1.301-1 Solicitation of agency and public input. (a) The FAR Secretariat shall solicit input from agencies and the public on proposed revisions to the FAR. This solicitation shall be conducted through the FAR Secretariat's public participation process. (b) The FAR Secretariat shall solicit input from agencies and the public on proposed revisions to the FAR. This solicitation shall be conducted through the FAR Secretariat's public participation process. (c) The FAR Secretariat shall solicit input from agencies and the public on proposed revisions to the FAR. This solicitation shall be conducted through the FAR Secretariat's public participation process. (d) The FAR Secretariat shall solicit input from agencies and the public on proposed revisions to the FAR. This solicitation shall be conducted through the FAR Secretariat's public participation process. (e) The FAR Secretariat shall solicit input from agencies and the public on proposed revisions to the FAR. 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1.302 Solicitation of public input.

(a) Comments on the proposed revision, addressed to the FAR Secretariat, are solicited for consideration in the formulation of the final revision that will be published in the FAR. Requests for public input must be received at least 60 days before the request for comments.

(b) Comments need not solicit comments if the (1) proposed revision does not constitute a significant revision of the FAR, or (2) solicitation is impractical, such as when a new statute must be implemented in a timely manner.

1.303 Public meetings.

Public meetings may be appropriate when a revision to adapt, amend, or delete FAR coverage is likely to benefit from specific, and additional views and discussion

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der agencies in their development and testing of new techniques and acquisition methods. Refer to 31.101 for information on the FAR Secretariat's role in the subject matter of Part 31, Contract Cost Principles and Procedures

1.404 Class deviations.

Class deviations affect only one contracting action, and, unless 1.405(c) is applicable, may be authorized by agency heads or their delegates. The justification and agency approval shall be documented in the contract file and a copy of the approved deviation shall be provided to the FAR Secretariat through a central agency control point.

(a) For civilian agencies except NASA, class deviations shall be approved by the agency head or their delegates, unless, 1.405(c) is applicable. Delegation of this authority shall not be made below the head of a contracting activity. Authorization of class deviations by agency officials is subject to the following limitations:

(1) An agency official who may authorize a class deviation, before doing so, shall consult with the FAR Secretariat and the FAR Secretariat's Council (CAA) Council, unless that agency official determines that urgent circumstances require that the FAR Secretariat be bypassed.

(2) Recommended revisions to the FAR shall be transmitted to the FAR Secretariat by agency heads or their delegates for authorizing class deviations.

(b) For DOD, class deviations shall be controlled and approved by the Deputy Under Secretary of Defense for Acquisition and Engineering (Acquisition Management) and shall be processed in accordance with agency regulations.

(c) For NASA, class deviations shall be controlled and approved by the Assistant Administrator for Procurement after consultation with the Deputy Under Secretary of Defense Research and Engineering (Acquisition Management). Deviations shall be processed in accordance with agency regulations.

1.405 Deviations pertaining to treaties and executive agreements.

(a) "Executive agreements" is used in this section, to mean Government-to-Government agreements, including agreements with international organizations, to which the United States is a party.

(b) Any deviation from the FAR required to comply with a treaty to which the United States is a party is authorized, unless the deviation would be inconsistent with FAR coverage based on a law enacted after the execution of the treaty.

1.501-1 Definitions.

"Significant revisions," as used in this section, mean revisions that alter the FAR's coverage of a significant portion of the FAR. Significant revisions include, but are not limited to, revisions that have a significant impact on contractors or officers, or a significant impact on the FAR's coverage of a significant portion of the FAR. Significant revisions include, but are not limited to, revisions that have a significant impact on contractors or officers, or a significant impact on the FAR's coverage of a significant portion of the FAR.

1.502 Opportunity for public comment.

(a) Plans of agencies and Governmental entities or organizations will be solicited for comment on proposed revisions to the FAR. The opportunity to submit written comments on proposed significant revisions shall be provided by placing a notice in the Federal Register. The date of this notice shall include—

(1) The text of the revision or, if it is impracticable to publish the full text, a summary of the proposal;

(2) The address and telephone number of the individual from whom copies of the revision, in printed form, may be obtained; and

(3) When 1.501-2(b) is applicable, a statement that the revision is effective on a temporary basis pending completion of the public comment period.

(c) A minimum of 30 days and, normally, at least 60 days will be given for the receipt of comments.

1.503-3 Exceptions.

(a) Comments need not be solicited when the proposed revision does not constitute a significant revision.

(b) Agency comments need not be solicited when urgent and compelling circumstances require the solicitation of comments impracticable prior to the effective date of the coverage, such as when the coverage is to be implemented on a relatively short period of time. In such case, the coverage shall be issued on a temporary basis for at least a 30-day public comment period.

1.502 Unsolicited proposed revisions.

Unsolicited proposed revisions to the FAR may be submitted to the FAR Secretariat at any time. The FAR Secretariat will consider such revisions for inclusion in the FAR. The FAR Secretariat will consider such revisions for inclusion in the FAR. The FAR Secretariat will consider such revisions for inclusion in the FAR.

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Public meetings may be appropriate when a revision to adapt, amend, or delete FAR coverage is likely to benefit from specific, and additional views and discussion

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PART 12—CONTRACT DELIVERY OR PERFORMANCE 12.505

compliance. The contracting officer must receive the request in writing within 10 days from the beginning of the period of delay. However, the contracting officer may extend this time limit before the date of final settlement of the contract. The contracting officer shall advise the contractor in writing of any adjustment for extending the completion date that the finality party.

12.403. Contract clauses.

(a) The contracting officer shall insert the clause at 52.212-9, Variation in Quantity, in solicitations and contracts, when a fixed price supply contract is contemplated and for services that involve the furnishing of supplies.

(b) The contracting officer may insert the clause at 52.212-10, Delivery of Excess Quantities of \$100 or Less, in solicitations and contracts, when a fixed price contract is contemplated and for services that involve the furnishing of supplies.

(c) The contracting officer shall insert the clause at 52.212-11, Variation in Unmanned Quantity, in solicitations and contracts when a fixed price construction contract is contemplated that authorizes a variation in the estimated quantity of unit priced items.

SUPPORT 12.5—SUSPENSION OF WORK, STOP-WORK ORDERS, AND GOVERNMENT DELAY OF WORK

12.501. General.

Stop-work orders may occur during contract performance that cause the Government to order a suspension of work, or a work stoppage. This subpart provides clauses to meet these situations and a clause for settling contractor claims for interrupted Government caused stop-work orders.

12.503. Suspension of work.

A suspension of work under a construction or architect-engineer contract may be ordered by the contracting officer for a reasonable period of time. If the suspension is unreasonable, the contractor may submit a claim for the cost of performance, including profit.

12.505. Stop-work orders.

(a) Stop-work orders may be used, when appropriate, in any negotiated fixed-price or cost-reimbursable contract. Stop-work orders may be required for a service contract if work stoppage may be required for the contractor's advancement in the state of the art, production or engineering breakthrough, or realignment of program.

(b) Generally, a stop-work order will be issued only if the contractor is not in compliance with the terms of the Government and a stop-work order is necessary for the work for the suspension is not feasible because of a stop-work order shall be applied at a level higher than the contracting officer. Stop-work orders shall not be used if the contractor is in compliance with the terms of the contract and a stop-work order is not necessary after a decision to terminate has been made.

(c) Stop-work orders shall be issued—

(1) A decision of the work to be suspended;

(2) Instructions concerning the contractor's suspension of work; and

(3) Guidance to the contractor on action to be taken on any subcontracts, and

(4) Other suggestions to the contractor for minimizing costs.

After issuing the stop-work order, the contracting officer should discuss the stop-work order with the contractor and modify the order, if necessary, in light of the discussion.

(e) As soon as feasible after a stop-work order is issued, the contracting officer shall take appropriate action to—

(1) Terminate the contract;

(2) Cancel the stop-work order (any cancellation of a stop-work order shall be subject to the same requirements as the original stop-work order);

(3) Extend the period of the stop-work order if it is necessary and if the contract for any extension of the stop-work order shall be by a supplemental agreement;

12.504. Government delay of work.

(a) The contracting officer shall insert the clause at 52.212-12, Government Delay of Work, in solicitations and contracts. The clause provides for the "advisative" settlement of contractor claims that arise from delays and interruptions in the contract work caused by the acts or failures to act of the contracting officer. This clause is not intended to cover claims for delays and interruptions for an equitable adjustment because of the delay or interruption of E, when the Changes clause is applicable.

(b) The clause does not authorize the contracting officer to order a suspension of work or a stop-work order. The clause does not authorize the contracting officer to justify non-compliance of such an order.

(c) If the contracting officer has notice of an unauthorized delay or interruption covered by the clause, the contracting officer shall act to end the delay or stop the interruption of work as soon as possible.

(d) The contracting officer shall return in the file a record of all negotiations leading to any adjustment made under the clause, and related cost or pricing data.

12.505. Contract clauses.

(a) The contracting officer shall insert the clause at 52.212-13, Suspension of Work in Solicitations and Contracts when a Fixed Price Construction or Architect-Engineer Contract is Contemplated.

(b) The contracting officer shall insert the clause at 52.212-14, Stop-Work Order—Fixed Price Construction or Architect-Engineer Contract, in solicitations and contracts for supplies, services, or research and development.

(c) If a cost reimbursement contract is contemplated, the contracting officer shall insert the clause at 52.212-15, Stop-Work Order—Cost Reimbursement Contract, in solicitations and contracts when a facilities or mission contract or a nonmodular facilities contract is contemplated.

(b)(1) The contracting officer shall insert the clause at 52.212-13, Stop-Work Order—Fixed Price Construction or Architect-Engineer Contract, in solicitations and contracts for supplies, services, or research and development.

(2) Except as provided in (b)(1) above, the contracting officer may, when contract is contemplated, the contracting officer shall insert the clause at 52.212-14, Stop-Work Order—Fixed Price Construction or Architect-Engineer Contract, in solicitations and contracts for supplies, services, or research and development.

(3) If a cost reimbursement contract is contemplated, the contracting officer shall insert the clause at 52.212-15, Stop-Work Order—Cost Reimbursement Contract, in solicitations and contracts when a facilities or mission contract or a nonmodular facilities contract is contemplated.

PART 14—FORMAL ADVERTISING

14.407-9

- (6) Qualified products (see Subpart 9.2).
 (7) Federal, State, and local laws (see Part 29).
 (8) Origin of supplies, and, if foreign, the application of the Buy American Act (see Part 25).

14.407-4. Equal fee bids.

(a) Contracts shall be awarded in the following order of priority when two or more low bids are equal in all respects.

- (1) Small business concerns that are also labor surplus area concerns.
- (2) Other small business concerns.
- (3) Other business concerns that are also labor surplus area concerns.

(b) If two or more bidders still remain equally eligible after the awarding process, the award shall be made by a drawing by lot limited to those bidders. If time permits, the bidders involved shall be given an opportunity to attend the drawing. The drawing shall be witnessed by at least three persons, and the contract, the bid amount, the award, and the drawing of lots shall be made in the presence of the awarding official and the person supervising the drawing.

(c) When an award is to be made by using the priorities under this 14.407-4, the contracting officer shall include a written agreement in the contract that the contractor will perform, or cause to be performed, the contract in accordance with the circumstances justifying the priority used to break the tie or select bids for a drawing by lot.

14.407-7. Documentation of award.

(a) The contracting officer shall document compliance with 14.407-2 in the contract file.

(b) The contracting officer shall state that the accepted bid was the lowest bid received, or list all lower bids with reasons for their rejection in sufficient detail to justify the award.

(c) When an award is made after receipt of equal low bids, the documentation shall describe how the tie was broken.

14.407-8. Protest against award.

(a) Contracting officers shall consider all protests or objections to the award of a contract, whether submitted before or after award, and shall take prompt action to resolve the protest. The protest shall be received, written confirmation of the protest shall be requested. The protester shall be awarded in writing of the final decision of the written protest (See 1935 for protests of small business status and 1936 for protests of small business status and 1937 for protests of small business status under the War Relocation Public Contracts Act). An interested party wishing to protest to the Comptroller General of the United States against an award of a contract should do so in accordance with General Accounting Office (GAO) Regulations (41 CFR 101-11.1).

See Subpart 33-1, Protests.

(7) When a protest, before or after award, has been lodged with a higher authority or the GAO and the contracting officer is requested to submit a report in writing, he shall submit a copy of—

- (i) The protest.
- (ii) The bid submitted by the protesting bidder and a copy of the bid of the bidder who if losing is considered for award or whose bid is being protested.
- (iii) The invitation, including the specifications or portions relevant to the protest.
- (iv) The abstract of offers or relevant portions of the protest.
- (v) Any other documents that are relevant to the protest.

(b) The contracting officer's signed statement setting forth findings, actions, and recommendations and any additional evidence or information deemed necessary in determining the validity of the protest. The statement shall include the following: (1) The allegations of the protest; (2) If the award was made after receipt of the protest, the contracting officer's report will include the determination prescribed in subparagraph (b)(4) below.

(3) Other persons, organizations, or agencies involved in the protest. (4) The reasons for the protest and its basis in appropriate cases. These persons shall also be advised that they may submit their views and relevant information to the contracting officer within a period of 10 working days of receipt of the protest. (5) The protest of the protester shall be given notice that, if the protest has been lodged with the GAO, copies of such submissions should be furnished directly to the GAO.

(4) Since timely action on protests is a priority, the contracting officer shall submit a report to the GAO. Upon receipt of informal advice that a protest has been lodged with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. To further expedite the report, the contracting officer shall submit a copy of the protest to the GAO, simultaneously furnish a complete copy (except for classified or privileged information) to the protester and advise the GAO that the protester has been advised of the right to submit a written protest to the GAO as well as administrative report directly to the GAO as well as to the contracting officer.

(5) Agencies shall furnish the GAO with the name, title, and telephone number of the official to whom the GAO may contact regarding protests. Each agency shall be responsible for promptly advising the GAO of any change in the designation of the official. Agencies shall be responsible for forwarding protests directly to the GAO by the office handling the contract.

14.17

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~~Owner should consider seeking a mutual agreement with the contractor to suspend performance on a no-cost basis.~~

- the contractor to submit performance on a 30-day basis.
- 44-008-10 Information to bidders.
- 44-008-11 Award of unsolicited contract.
- (a) The contracting officer shall, as a minimum (subject to the provisions of paragraph (b)), accept and award a contract to the bidder who has submitted the lowest responsive bid. Notwithstanding, the contracting officer shall promptly take the following actions in the event of a bid that is not accepted:
- (1) When a bid is not accepted, the contracting officer shall advise the bidder of the reasons for the nonacceptance of the bid.
- (2) Extended appreciation for the interest the unsuccessful bidder has shown in submitting a bid and the fact that the bid was not accepted.
- (3) When a bid is made to confer with the bidder, the contracting officer shall advise the bidder of the reasons for the nonacceptance of the bid.
- (4) Notification to unsuccessful bidders may be oral or in writing through the use of a form postal card or other appropriate means.
- (c) Should the contractor desire information to be requested by the contracting officer, the contractor shall provide the unsolicited bidder with the name and address of the successful bidder, the contract price, and the location where a copy of the abstract of offer is available for inspection. However, when multiple awards have been made, bidders would be required to come in to the contracting office to see the abstract of offer so much as to interfere with normal operations of the contracting office. Only information concerning the location of the abstract of offer should be given.
- (d) When a request is received concerning an unsolicited bid, the contracting officer shall take the following action:
- (i) When a representative of a bidder, the contracting officer should make every effort to furnish the names of the successful bidder and the contract price to the unsuccessful bidder, if requested. The prices at which the contract was made. However, when such requests are so much as to interfere with normal operations of the contracting office, the contractor will be required to come in to the contracting office, the contractor will be advised where a copy of the abstract of offer may be seen.

(c) Requests for records shall be governed by agency

14.408.2 Award of classified contracts.

In addition to 14.409-1, if classified information was furnished or created in connection with the solicitation, the contracting officer shall advise the unsuccessful bidders, including any who did not bid, to take appropriate action in accordance with agency procedures. The name of the successful bidder and the contract price will be furnished to unsuccessful bidders only upon request. Information regarding a classified award shall not be furnished by telephone.

SUMMARY 14.5—TWO-STEP FORMAL

14.501 General.
Two-step formal advertising is a method of contract-
ing designed to obtain the benefits of formal advertising
when adequate specifications are not available. An ob-

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FAC-84-1 MARCH 26, 1984

PART 27—PATENTS, DATA, AND COPYRIGHTS

SUBPART 27.4—RIGHTS IN DATA AND

COPYRIGHTS

27.401 General.

It is necessary for Government departments and agencies, in order to carry out their missions and programs, to acquire or obtain access to many kinds of data developed under or used in performing their contracts with and for the Government. It is necessary to position among suppliers to meet acquisition needs; to ensure logistic support; to fulfill certain responsibilities for disseminating and publishing the results of their activities; to ensure appropriate use of the results of research, development, and demonstration activities; and to develop other programs and technology.

At the same time, the Government recognizes that its contractors may have a property right or other valid economic interest in certain data resulting from private investment, and that the protection from unauthorized use and disclosure of this data, and other data made available to the Government, is a legitimate right or economic interest. The Government recognizes that the contractor's right or economic interest in such property right or economic interest, jeopardizing the contractor's commercial position, and impairment of the Government's ability to obtain access to or use of such data. Protecting this data is therefore necessary to encourage qualified contractors to participate in Government programs. Specific agency regulations shall be framed in light of the above considerations to strike a balance

between the Government's need and the contractor's economic interest.

SUBPART 27.5—RESERVED

SUBPART 27.6—FOREIGN LICENSE AND TECHNICAL ASSISTANCE AGREEMENTS

Agencies shall provide all necessary rules and regulations as are required for the proper application of the laws and policies of the U.S. Government regarding—

- (a) Elimination in agreement between domestic contractors and foreign contractors of the right of the Government for the use of patents in which the U.S. Government has a royalty-free license or of charges in agreement for the use of data that the U.S. Government has a right to use and disclose to others, that it in the public domain, or that have been accepted by the Government for the use of the Government right to use, disclose, or disclose and to have or permit others to do so;
- (b) Foreign license and technical assistance agreements between the U.S. Government and United States domestic concerns;
- (c) Conditions for negotiating contract prices and terms concerning patents and data, including royalties, in contracts between the U.S. Government and a foreign government or foreign concern; and
- (d) Regulations and guidance on controls on the export of data and technical assistance, including such as arms or munitions of war, and guidance on review of agreements involving such data (see 22 CFR 124).

Civilian agencies other than NSA shall not be required to provide data pursuant to validation of proprietary data restrictions.

Postcard

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- (1) A contracting officer's decision, if any.
- (2) The contract, if any.
- (3) All relevant correspondence.
- (4) Affidavits or statements of witnesses on the matter under protest.
- (5) All documents relied upon by the contracting officer in making the action protested.
- (6) A copy of the solicitation, the proposer's bid or proposal, and the contract, if any, and a copy of the contract when the contract has been awarded, a copy of any relevant bids and the bid abstract.
- (7) In a negotiated acquisition, a copy of offers or proposals received from the proposer and a copy of the contract awarded by the GSA shall serve as the documents to be submitted. A list of documents provided to the Board for its review shall be included in the GSA file.
- (8) Any additional written evidence or information necessary to determine the merits of the protest.
- (9) Any information otherwise withheld, where it is appropriate for its release, review by the Board.
- (10) The GSA's records upon that with which its work was done after the filing of the protest, or such longer time as the Board may establish, the agency shall make available for the Board's review, including the contract, the protest and its findings, actions, and recommendations to the protester.
- (11) If a protest concerns a timely request for a suspension of procurement authority, a hearing will be held within 15 calendar days after the filing of the protest. The Board shall suspend the procurement authority unless the agency establishes that—
 - (A) About 15 calendar days, the contract award is likely within 15 calendar days;
 - (B) Urgent and compelling circumstances which necessitate an effect in less than 15 calendar days will not prevent sufficient time for the decision;
 - (C) Circumstances in (d)(1) above shall be established by a BAF sanctioned by the agency head or designee.
- (12) The Board's decision on suspension may be oral.
- (13) A hearing on the merits, if requested, will be held within 25 work days after the filing of the protest, and the GSA's decision on the merits will be issued within 45 work days after the filing of the protest. The Board shall suspend the procurement authority unless the agency establishes that—
 - (A) The GSA's decision as appropriate increased party to be entitled to the contract;
 - (B) Filing and pursuing the protest, including reasonable attorney's fees; and
 - (C) Bid and proposal preparation.

(2) Costs awarded under (1)(1) above shall be paid promptly by the agency out of funds available to it for the use of the acquisition of property for the Government.

(3) Payment of costs under (1) above shall be made at the earliest practicable time, but not later than 30 days after the date of the award of the contract.

31.106 Solicitation provisions.

The contracting officer shall insert the provision at 31.271-1, Service of Process, in solicitations for other than small purchases.

SUB-ART 33.2 -- DISPUTES AND APPEALS

33.201

subject

33.207

33.206(a)

33.202

33.203

subject

33.201 Definitions.

"Claim," as used in this part, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or resulting from the contract. It does not include a claim that the contractor is entitled to a contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the contractor for a sum certain in excess of \$50,000, and for a claim under the Contract Disputes Act of 1978 and certified as required by the Act and 33.202. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. It is not a claim when it is submitted to a contracting officer as provided in 33.204(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

"Contract Disputes Act of 1978" means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

The Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act) establishes procedures and requirements for asserting and resolving claims by or against contractors arising under or relating to a contract subject to the Act. It also provides for the review and payment of interest on contractor claims, for the certification of contractor claims in excess of \$50,000, and for a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

(a) Except as specified in paragraph (b) below, this part applies to any express or implied contract covered by the Federal Acquisition Regulation (FAR) and to any contract with (1) a foreign government or agency of that government, or (2) an international organization or a subsidiary body of that organization, if the agency head deter-

mines that the application of the Act to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters arising under or relating to a contract subject to the Contract Disputes Act of 1978 (the Act) authorized under the Act continue to have all of the authority they possessed before the Act with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The authority of the contracting officer under the "all disputes" authority established by the Act and states certain requirements and limitations of the Act for the guidance of contractors and contracting agencies. The clause is not intended to affect the authority of the contracting officer under the Act or to constrain the authority of the statutory agency (BCA) in the handling and deciding of contractor appeals under the Act.

33.202 Policy.

It is the Government's policy to try to resolve all contract disputes without litigation. In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions and mediation. The contracting officer should not interpret substantially in the matter in dispute, to aid in resolving the differences.

33.203 Retainability of the Act to Public Law 85-804.

(a) Requests for relief under Public Law 85-804 (50 U.S.C. 1431-1435) are not claims within the Contract Disputes Act of 1978 and are not subject to the Act. Disputes shall be processed under Part 30, Extraordinary Contractual Actions. However, relief for extraordinary Contractual Actions shall be available only under Public Law 85-804, i.e., legal entitlement to rescission or reformation of the contract shall be available only within the authority of the contracting officer under the Contract Disputes Act of 1978 and the Dupages clause. In case of a question whether the contracting officer has authority to settle or decide a contract dispute, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Contract Disputes Act of 1978 and the Dupages clause. If the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complexities legal issues likely to be associated with allegations

FEDERAL ACQUISITION REGULATION (FAR)

33.206

of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied or not approved in its entirety under paragraph (b) above may be cognizable as a request for relief under Public Law 95-504 as amended by Part 50. However, the claim must first be submitted to the Contract Disputes Act of 1978, from under the Contract Disputes Act of 1978 because the claim is not cognizable under Public Law 95-504, as implemented by Part 50, unless other legal authority exists. Any remedy concerned is determined to be lacking or inadequate.

33.900—Initiation of a claim.

(a) Contractor claims shall be submitted in writing to the contracting officer for a decision. The contracting officer shall document the contract file with evidence supporting the claim and the contracting officer's decision deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor.

33.901—Contractor claim certification.

(a) A contractor claim exceeding \$50,000 shall be accompanied by a certification that—

- (1) The claim is made in good faith;
- (2) Supporting data are accurate and complete to the best of the contractor's knowledge and belief;
- (3) The amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable;
- (4) The claim is made within the increased and decreased cost shall be used in determining when the dollar thresholds requiring claim certification are met (see the example in subdivision 13.804-2(a)(1)(ii)).

(c) If the contractor is an individual, the certification shall be signed and dated by the individual.

(2) If the contractor is not an individual, the certification shall be executed by—

- (i) A senior company official in charge at the contracting officer's location involved, or
- (ii) An official responsible for the conduct of the contractor's affairs.

33.902—Interest on claims.

The Government shall pay interest on a contractor's claim if the contractor certifies that the claim is properly certified if required by 33.901(b), or (b) the date payment otherwise would be due, if that date is later, then the date of payment. Simple interest on claims shall be paid on the amount of the claim from the date of the period during which the contracting officer received the claim and then at the rate applicable for

each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. See 32.614 for the right of the Government to collect interest on its claims.

33.903—Simplified final decision.

If the contractor is unable to support any part of the claim and there is evidence that the claim is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the claim to the agency official responsible for investigating fraud.

33.904—Contracting officer's authority.

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or settle all claims arising under the contract that are not subject to the ACT. This authorization does not extend to—

- (a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine on appeal;
- (b) A claim involving fraud (see 33.909).

33.905—Contracting officer's decision.

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall—

- (1) Review the facts pertinent to the claim;
- (2) Secure assistance from legal and other advisors;
- (3) Coordinate with the contract administration office or contracting officer, as appropriate; and
- (4) Prepare a written decision that shall include—
 - (i) Description of the claim or dispute;
 - (ii) Reference to the pertinent contract terms;
 - (iii) Statement of the factual areas of agreement and disagreement;
 - (iv) Statement of the contracting officer's decision and rationale;
 - (v) Paragraph substantiating the decision.

This is the final decision of the Contracting Officer. You may appeal this decision to the Board of Contract Appeals. If you decide to appeal, you must, within 90 days of the date of the contracting officer's decision, otherwise furnish written notice to the Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The contracting officer shall provide the contractor with a copy of this decision and inform the contractor of the right to appeal this decision to the Board of Contract Appeals.

Instead of appealing to the Board of Contract Appeals, you may bring an action directly in the U.S. Claims Court (except as provided in the Contract Disputes Act of 1978). The contractor must file the appeal within 12 months of the date of the contracting officer's decision. If you appeal to the Board of Contract Appeals, you may, solely at your election, proceed under the Board's

PART 33—DISPUTES AND APPEALS

PROTESTS, DISPUTES,

small claims procedure for claims of \$10,000 or less or an accelerated procedure for claims of \$50,000 or less.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, and shall retain a copy of the decision and evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following time periods after receipt of a claim:

- (1) For claims of \$50,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

- (2) For claims over \$50,000, 90 days after receiving a certified claim, *provided, however*, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account—

- (1) The size and complexity of the claim,
- (2) The adequacy of the contractor's supporting data, and
- (3) Any other relevant factors.

(e) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contracting officer may request the agency BCA to direct the contracting officer to issue a decision in a specified time period determined by the BCA.

(f) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(g) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the contractor's right to appeal.

33.214—Contracting officer's duties upon appeal.

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, and explanation of the facts and circumstances to the agency BCA for use on a pending appeal from the contracting officer's decision.

33.215—Obligations to continue performance.

(a) In general, before passage of the Act, the obligation to continue performance of a contract was imposed on the contractor by the Federal Acquisition Regulation Act authorizes agencies to require a contractor to continue contract performance in accordance with the contract terms during the period of time that a claim is pending. The contractor is not required to continue performance of the contract in the event of a claim pending.

(b) of the clause at 33.233-1, Dispute. This paragraph shall be used only as authorized by agency procedures. (1) The contractor shall continue performance of the contract during the period of time that a claim is pending, but not during the period of time that a dispute is pending, unless the contractor, with its Alternate I, in the event of a dispute, through appropriate agency procedures, financing of the contractor, or otherwise, demonstrates that the Government's interest is properly secured.

33.216—Contract claims.

The contracting officer shall insert the clause at 33.233-1, Dispute, in solicitations and contracts unless the contracting officer determines that the contractor's agency procedures that ensure performance of the contract during the period of time that a claim is pending are satisfactory pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its Alternate I.

33.214

33.212

33.213

33.214

33.203

PART 39

MANAGEMENT, ACQUISITION, AND
USE OF INFORMATION RESOURCES

~~Subpart 39B-100~~ contains policies, procedures, and
guidelines peculiar to automatic data processing

Chapter 201 of Title 41 of the
Code of Federal Regulations

(ADP), telecommunications, and related resources.
Contracting for ADP, telecommunications, and related
resources shall be accomplished in accordance with
agency supplement and other FAR parts when appli-
cable.

Service of Protent.

PART 32—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

§ 212.14

§ 212.13 Suspension of Work.

As prescribed in 12-503(a), insert the following clause in solicitations and contracts when a fixed price construction or architect-engineer contract is contemplated:

SUSPENSION OF WORK (APR 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate. The Contractor shall be compensated for the cost of suspension, delay, or interruption of the work as follows:

(b) If the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract; or (2) by the Contracting Officer's failure to act within a reasonable time after the Contractor has notified the Contracting Officer (in writing) of the suspension, delay, or interruption, an adjustment shall be made for the increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract shall be amended accordingly. The Contractor's adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor. The Contractor's adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed (1) for any costs incurred more than 70 days before the Contractor has notified the Contracting Officer in writing of the act or failure to act involved; but this requirement shall not apply to a claim resulting from a suspension order; and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, and no later than the date of final payment under the contract.

(End of clause)

(R 7-902.46 1968 FEB)

§ 212.13 Stop-Work Order.

As prescribed in 12-503(b), insert the following clause in solicitations and contracts when a fixed price construction or architect-engineer contract is contemplated. The "90-day" period stated in the clause may be reduced to less than 90 days.

(a) **STOP-WORK ORDER (APR 1984)**

(b) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period of time that the Contracting Officer may determine. The Contractor shall be compensated for the cost of suspension, delay, or interruption of the work as follows:

shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work order is issued, the Contractor shall submit a written proposal to the Contracting Officer, in which an extension of this period and to which the parties shall have agreed, the Contracting Officer shall either—

- (1) Cancel the stop-work order; or
 - (2) Terminate the work covered by the order as provided in the Contracting Officer's written order.
- (b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the contract price for the work covered by the order. The contract shall be modified, in writing, accordingly.

If—

- (1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of the work covered by the order; and

- (2) The Contractor asserts a claim for the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contractor may assert a claim for adjustment at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow the Contractor an equitable adjustment in the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(End of clause)

(AV 7-102.3 1971 APR)

Alternate 1 (APR 1984). If this clause is inserted in a cost-reimbursement contract, substitute in paragraph (a)(2) the words "the Termination clause of this contract" for the words "the Contracting Officer's written order." In the Contracting Officer's written order, the words "the Termination clause of this contract" in paragraph (b) substitute the words "an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other term of the contract that may be affected by the stop-work order." The Contractor shall submit a written proposal in the delivery schedule or contract price or both."

§ 212.14 Stop-Work Order—Facilities.

As prescribed in 12-503(c), insert the following clause in solicitations and contracts when a facilities

(B) As officer or general partner of the Contractor having overall responsibility for the construction of the contract.

(c) For Contractor claims of \$50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over \$50,000, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 90 days of the request to satisfy the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the contract.

The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certified if required), or (2) the date payment otherwise would be due, interest at the contract interest rate, fixed by the Secretary of the Treasury as provided in the A-CI, which is applicable to the period during which the Contracting Officer receives the claim and files a decision thereon, or (3) the date of payment of the claim, whichever is later, at the option of the Contractor.

(b) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising out of this contract, and comply with any decision of the Contracting Officer.

(End of clause)

(R 7:103.12 1980 JUN)

(R PPR Temporary Regulation 32-11 1980 JUN)
 Alternate 1 (AFR 1980 JUN) If the Contractor's primary pending resolution of any claim arising under or relating to the contract, substitute the following paragraph (h) for the paragraph (b) of the basic clause:

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising out of this contract, and comply with any decision of the Contracting Officer.

(AV 7:103.12(h) 1980 JUN)

32.234 Reserved.

32.235 Reserved.

32.236-1 Performance of Work by the Contractor.

As prescribed in 32.5016, insert the following paragraph (c) in the contract. The Contractor's construction contract is contemplated and the contract amount is expected to exceed \$1,000,000. The Contracting Officer may insert the clause in solicitations and contracts when a fixed-price construction contract is contemplated and the contract amount is expected to be \$1,000,000 or less. Complete the clause by inserting the appropriate percentage consistent with the com-

pleteness and magnitude of the work and customary or necessary practice in the industry (see 32.5016).

PERFORMANCE OF WORK BY THE CONTRACTOR (AFR 1984)

The Contractor shall perform on the life, and with its own organization, work equivalent to at least 100% of the work to be performed under the contract. The Contractor shall be responsible for the completion of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performance of the work, the Contractor requests a reduction in the amount of work to be performed under the contract and the reduction would be to the advantage of the Government.

(End of clause)

(R 7:603.15 1985 JAN)

(R 1:18 104)

32.236-2 Differing Site Conditions.

As prescribed in 32.502, insert the following clause in solicitations and contracts when the Contractor is required to perform work in an area where the nature, extent, or location of the work is not fully known to the Contractor at the time of award of the contract. The contract amount is expected to exceed the small purchase limitation. The Contracting Officer may insert the clause in solicitations and contracts when the Contractor is required to perform work in an area where the nature, extent, or location of the work is not fully known to the Contractor at the time of award of the contract. The contract amount is expected to exceed the small purchase limitation.

(End of clause)

(R 7:603.15 1985 JAN)

DIFFERING SITE CONDITIONS (AFR 1984)

(a) The Contractor shall promptly advise the Contracting Officer of (1) any surface or latent physical conditions at the site which differ materially from those indicated in the contract, or (2) unknown physical conditions at the site of an excavation or foundation work, or (3) any other conditions not reasonably recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. The Contracting Officer shall determine the extent and nature of the conditions and the Contractor's cost of, or the time required for, performing any part of the work under the contract, whether or not changed as a result of the conditions. An equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required, provided, and verified in accordance with the contract. The Contractor's notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions

32.233-2 Service of Protest.

As prescribed in 32.1016, insert the following provision:

SERVICE OF PROTEST (JAN 1985)

Protests, as defined in section 32.1016, shall be received by the Contracting Officer only if the Contracting Officer is notified in writing and dated acknowledgment of receipt from

Contracting Officer designated Official or location where a request may be served on the Contracting Officer.

(End of Provision)

9. January 8, 1985.--Letter from Chairman Jack Brooks to OMB Director David A. Stockman regarding constitutionality of Competition in Contracting Act provisions.

NINETY-NINTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT OPERATIONS

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, D.C. 20515

January 8, 1985

The Honorable David A. Stockman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Dave:

I am deeply disturbed by the issuance of your December 17, 1984, directive regarding agency implementation of the Competition in Contracting Act of 1984. Based on an opinion by the Attorney General that certain provisions of the law pertaining to bid protests are unconstitutional, you have directed, among other things, that:

- "o Agencies shall take no action, including the issuance of regulations, based upon the invalid provisions.
- "o With respect to the 'stay' provision, agencies shall proceed with the procurement process as though no such provision were contained in the Act."

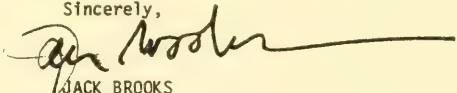
* * *

- "o With respect to the damages provision of the Act, agencies shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General."

In my opinion, your action in this matter is both inappropriate and illegal. The Competition in Contracting Act was duly enacted by Congress and signed into law by the President in accordance with Constitutional requirements. It is the law of the land. Absent a judicial determination as to the unconstitutionality of the provisions in question, you are duty bound to uphold the law. Furthermore, you have no legal basis to direct other Federal officials to violate the law. Surely you must recognize that only anarchy can prevail when the discretion to obey the law of the land is left to the individual, whether a private citizen or a Federal official.

I consider this to be a most serious matter, and question whether the President personally approved the directive and under what authority it was issued. In view of these concerns, I request that you provide a response to this letter within two weeks so that the Committee can decide what additional actions must be taken. Your expeditious handling of this request would be appreciated.

Sincerely,


JACK BROOKS
Chairman

Reagan Battling Sections of Law On Cost Cutting

By DAVID BURNHAM A-1
Special to The New York Times

WASHINGTON, Jan. 1 — The White House and Congress are in a dispute over a law that authorizes the General Accounting Office to review whether Government contracts have been properly awarded.

The Reagan Administration has instructed Federal agencies not to comply with the disputed provisions of the law, which President Reagan signed under protest. In this way it hopes to force a quick court test of the constitutionality of the provisions.

The Reagan Administration does not see the law as a means to achieve its subject to the overall goal of the legislation. The law, the Competition in Contracting Act, seeks to lower the cost of the Government's projects in a period when two-thirds of its contracts are reportedly let without competitive bidding.

Evidence collected by the House Government Operations Committee and it to report, "With increased competitive bidding, billions could be saved annually."

Continued on Page A17, Column 1

Reagan in Dispute With Congress on Law to Foster Bidding

Continued From Page A1

to the provisions authorizing the G.A.O., an arm of Congress, to review protests by unsuccessful bidders. The department contends the provision unconstitutionally invades the power of the executive branch. The review power may have no effect on whether the contract is let.

The sponsors of the legislation, including some Congressional Republicans, argue that because the head of the General Accounting Office is appointed by the President, the official is an officer of the United States rather than of Congress alone.

One leading critic of the Administration position is Senator William S. Cohen, Republican of Maine. Before the order went out to executive agencies not to adhere to the law, Senator Cohen warned Attorney General William French Smith that such an action

would constitute "a usurpation of the proper role of the judiciary and a failure of the President to meet his constitutional responsibility to 'take care that the laws be faithfully executed.'"

Mr. Cohen, chairman of the Governmental Affairs Oversight Subcommittee, said the action would be "inconsistent with the Justice Department's historical understanding," that the executive branch had an obligation to enforce even those laws "whose constitutionality the department doubts."

In a response to Senator Cohen on Nov. 21, Attorney General Smith said his recommendations to the President were consistent with his oath of office to support and defend the Constitution. Mr. Smith cited an occasion in 1981

When Benjamin R. Civiletti, then the attorney general, informed Congress that the Carter Administration would not enforce certain criminal provisions of the United States Code because it doubted their constitutionality, Mr. Smith added the action would mean a quicker resolution of the constitutional questions.

B. Morrison, litigation director

for Public Citizen, a group loosely affiliated with Ralph Nader, said the dispute over the power of the General Accounting Office in relation to the executive branch raised "a substantial constitutional issue." Public Citizen brought cases that led the Supreme Court to hand down decisions in 1982 and 1983 sweeping aside laws set

The specific targets of the Administration are the provisions authorizing

described as an auditing arm of Congress, to examine and take limited action when contractors charge that their bids have not been properly considered by the Government. The G.A.O. has served as an informal court of appeals for such protests for almost 60 years.

Part of Deficit Reduction Act

last June 27 and signed by Mr. Reagan on July 18. In a statement, Mr. Reagan said that while he was signing "this important legislation," he believed that certain provisions were unconstitutional.

was "instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply in a manner consistent with the Constitution."

Mr. Smith, the Justice Department's Office of Legal Counsel said that in its opinion two provisions of the law were "unconstitutional and should be severed from the remainder of the act."

to comply with the specified provi.

Some lawyers have already challenged the contention of the Justice Department that the G.A.O. provisions violate the constitutional principle of separation of powers. Among those rejecting the Administration position are the Office of Legal Counsel of the Senate, legal counsel to the Clerk of the

The G.A.O. sections were designed by Representative Jack Brooks, a Texas Democrat who is chairman of the House Committee on the Library of Congress, Senator Cohen and the General Accounting Office itself.

the House Government Operations Committee, to support efforts to require Government agencies to purchase goods and services by competitive bidding rather than through negotiated contracts.

The House Government Operations Committee's recent report found that at least two-thirds of all Government acquisitions were being made on a non-competitive basis and that the proportion of such purchases appeared to be

These agencies were listed as the Defense Department, the Energy Department, the National Aeronautics and Space Administration, the Veterans Administration and the Department of Transportation. The committee's re-

The report also said that "only 25 percent of all Government purchases, or 10 percent of all Government purchases, accounted for these agencies accounted for 4 percent of all Government purchases."

The committee's report said current A.O. procedures on bid protests did not "provide an adequate remedy to those wrongfully excluded" from bidding. It said that in the last three years the accounting office received 7,000

To support its contentions, the report cited a case where a seal for an Air Force engine was bought for \$2,020 when with competitive bidding it cost \$476. On such bases, the report reached its conclusion of a potential saving of billions annually.

Smith Defends Conclusions

Mr. Smith said one result of his procedural decision would be to facilitate rather than slow a timely "judicial resolution of the constitutional issues."

The Attorney General said the Administration's decision was required

Legal experts in the Library of Congress and elsewhere, however, contend that that Supreme Court decision is not relevant to the law at issue.

They contend that because the Comptroller General, the head of the G.A.O., is appointed by the President he is an officer of the United States, and not just an officer of Congress. They also note that, unlike the laws giving a house of Congress the power to veto an executive branch action, the authority granted to the G.A.O. under the new provisions signed by Mr. Reagan was largely advisory.

Smith Defends Conclusions

In the letter to Senator Cohen, Attorney General Smith defended the legal conclusion that the G.A.O. provisions were unconstitutional and the Administration's instructions to Federal agencies not to obey a law.

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11. 1985.--Article by Paul C. Besozzi, "The New Bid Protest Statute: Is It Constitutionally Suspect?" Public Contract Newsletter, Winter 1985.

The New Bid Protest Statute: Is It Constitutionally Suspect?

by Paul C. Besozzi
Member of the Virginia and D.C. Bars

I. INTRODUCTION

Last summer President Reagan signed a major tax bill which also included the Competition in Contracting Act—a set of substantial revisions to the federal procurement laws. Title VII, Division B, The Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (July 18, 1984). One of these changes gave the General Accounting Office (GAO) a specific statutory underpinning for its long-time role in fielding protests against government contract bids and awards. *Id.* at Subtitle D.

But in affixing his name to the legislation the President filed a protest of his own variety by "vigorously object[ing] to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the Executive branch." Statement by the President, Office of the Press Secretary, The White House, July 18, 1984. The targets of the President's statement and the soundness of the unconstitutional arguments employed to support it are the focus of this article.

II. THE BID PROTEST STATUTE: THE GENERAL FRAMEWORK AND UNPALATABLE TERMS

By its own account the GAO has been in the business of acting on Executive Branch contract protests for some sixty years. See Letter from Acting Comptroller General Milton Socolar to Congressman Jack Brooks (D.-Tex.), chairman, Committee on Government Operations, (B-208159), May 8, 1984, at 2 (hereinafter "Socolar Letter"). Currently, such protests are handled in accordance with a framework set out in the Code of Federal Regulations. 4 C.F.R. Part 21 (1984). But having fashioned a legislative scheme designed to promote competition in government contracting, the Congress also wanted a "strong enforcement mechanism . . . to ensure . . . that vendors wrongly excluded from competing for government contracts receive equitable relief." H. Rep. No. 861, 98th Cong., 2d Sess. 1435 (1984). With this goal in mind, the legislators approved a new law, which applies to protests filed on or after January 15, 1985, that "codifies and strengthens the bid protest function currently in operation" at the GAO. *Id.*

A. The General Framework

The new statutory provisions embody many features similar to those found in the existing regulatory mechanism. Thus, the process is triggered when an interested party (i.e., a directly affected actual or prospective bidder) contends that a solicitation, proposed

award, or contract award does not comply with procurement law or regulations and files a written protest to that effect with the GAO. Upon receipt of the protest the Comptroller General must quickly notify the executive agency involved; that agency in turn reports to the GAO. Then the Comptroller General has a period of time to decide whether the protest has merit. If he concludes that it does, he must recommend corrective action (e.g., resolicit, recompile, or terminate the contract) to the agency. A frivolous or *prima facie* invalid protest may be dismissed at any time in the process. See 31 U.S.C. 3552-3554.

The new law also establishes a series of explicit time deadlines for each major stage of the protest process. For example, the agency involved must generally report to the GAO within twenty-five working days after it is notified of the protest. 31 U.S.C. 3553(b)(2)(A). Except in rare cases, the Comptroller General must issue a decision on the protest within ninety working days after it is submitted to him. 31 U.S.C. 3554(a)(1).

B. The Unpalatable Terms

Although his salvo was broadly worded, the President was not criticizing the generic concept of a role for the GAO in the bid protest process. Rather, the Adminis-

Bid Protest Program Materials Available

Even if you couldn't be in San Antonio, you can still benefit from the materials presented at the Section's fall program. Divided into three parts, *Bid Protest: The New Law—Competition in Contracting Act—Its Implementation and Impact* analyzes the context, implementation, and impact of this important new law.

"The Competition in Contracting Act" section provides the text of the act, its legislative history, as well as commentary by David S. Cohen. "Implementation of the New Bid Protest Law" details the administrative, legislative, and executive concerns for implementation of the new law. And finally, "The Impact of the New Law" addresses the government's and contractor's perspectives on its impact on the contracting environment.

Certain to be a valuable addition to your law library, the *Bid Protest—Competition in Contracting Act* program papers are available for \$40 (plus \$2 for handling). Make your check payable to the American Bar Association and mail to: Order Fulfillment 539, American Bar Association, 750 N. Lake Shore Dr., Chicago, IL 60611.

tration found particularly unpalatable those portions of the new law which (1) provide for an automatic stay of the award or (in certain instances) performance of a government contract pending the Comptroller General's resolution of a protest (31 U.S.C. 3553(c), (d)) and (2) give the Comptroller General discretion to declare that a party is entitled to the costs of its protest, including reasonable attorneys' fees. 31 U.S.C. 3554(c). To a lesser extent, there was objection to a requirement that the contracting agency's report include "all relevant documents" with respect to a protested procurement. 31 U.S.C. 3553(b)(2).

The stay of an award goes into effect automatically when the agency involved receives notice of the protest; it remains in effect while the protest is pending, unless the head of the responsible procuring activity makes a written finding of "urgent and compelling circumstances which significantly affect interests of the United States" and so advises the Comptroller General. 31 U.S.C. 3553(c)(2). But he can only exercise this authority if "the award of the contract is otherwise likely to occur within 30 days." 31 U.S.C. 3553(c)(3).

Contract performance must be immediately suspended if the agency receives the notice of protest from GAO within ten days after the date of contract award; performance must remain suspended until the protest is decided. The suspension can be lifted if the head of the procuring activity finds in writing that performance of the contract is "in the best interest of the United States" or is dictated by "urgent and compelling circumstances that significantly affect interests of the United States." Again, the Comptroller General must also be so notified. 31 U.S.C. 3553(d)(2). Finally, although the new law does not set explicit deadlines, the Comptroller General is given some authority to expedite the decision process or, in "unique circumstances," to grant additional time to the reporting agency or himself. 31 U.S.C. 3553(b)(2)(B), 3554(a)(1), (2); H. REP. NO. 861, *supra*, at 1435-36.

As for the protesting party's costs, the GAO's decision here is not recommendatory. The agency concerned must make prompt payment "out of funds available to or for the use of the . . . agency for the procurement of property and services." 31 U.S.C. 3554(c)(2).

III. THE CONSTITUTIONAL FOOTING FOR ADMINISTRATION OBJECTIONS

The Administration supported its objections by citing the doctrine of separation of powers, the constitutional tenet that one branch of the government shall not invade the turf (i.e., usurp the powers or perform the functions) of its coordinate colleagues.

In the eyes of the Department of Justice, the GAO is "independent of the executive branch," 31 U.S.C. 702(a), and the Comptroller General is properly considered to be an officer of the Legislative Branch." Letter from Assistant Attorney General Robert A. McConnell to Congressman Jack Brooks (D.-Tex.), chairman, Committee on Government Operations, April 20, 1984, at 1 (hereinafter "McConnell Letter"). As such, he could not "exercise executive or judicial authority without violating the doctrine of separation of powers." *Id.* To

support its thesis, the Administration's legal counsel noted that the performance of executive-type functions by certain congressionally appointed members of the Federal Election Commission was vetoed by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), as an unconstitutional marriage of appointment source and assigned tasks. To the Justice Department, the power of the Comptroller General to delay the award of Executive Branch contracts sounded suspiciously unlike the investigative and informative functions constitutionally permitted to legislative appointees. *See id.* at 138. So did the ability to declare entitlements to attorney's fees or require submission of possibly privileged documents.

Moreover, Justice argued, giving this "officer of the Legislative Branch . . . the power effectively to block Executive action outside the legislative process" was reminiscent of the one-House veto mechanisms "clearly foreclosed" by the Supreme Court in *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983). McConnell Letter, *supra*, at 3. Here the culprit was the flexibility afforded the GAO within the statutory time parameters for disposing of protests. That limited discretion was perceived as tantamount to permitting a congressional committee to determine when an Executive Branch action could proceed.

These were the primary arguments and authorities that produced the President's lecture in constitutional law upon signing the bill. Upon closer examination, however, the contentions advanced appear to become decidedly less convincing.

IV. THE EVIDENCE THAT THE SEPARATION OF POWERS DOCTRINE HAS NOT BEEN BREACHED

It is unquestionable that the Comptroller General and his agency perform many services—largely investigative and informative—for the Legislative Branch. But separation of powers does not require "three airtight departments of government." *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). And a widespread perception of the GAO as an "arm of Congress" does not answer the constitutional questions raised by the President. The status of the GAO in the federal hierarchy, the appointive process for the Comptroller General, the nature of the functions he performs in deciding bid protests and the operation of the new bid protest law itself are far more important clues—clues which largely point to a conclusion that the new bid protest statute should pass constitutional muster. *See generally* Letter from Section on Public Contract Law, American Bar Association, to Senator Lawton M. Chiles (D.-Fla.), chairman, Senate Subcommittee on Federal Spending Practices and Open Government, July 22, 1977.

A. The General Accounting Office Is Not Necessarily Wholly Independent of the Executive Branch

One cannot read the legislative history of the Budget and Accounting Act of 1921 (hereinafter the "1921 Budget Act") without clearly perceiving the congres-

sional desire for an independent Comptroller General. But the prime concern may have been to structure an agency that would "exercise independence, in the sense of being fair and objective, in carrying out . . . [its] functions." See Williamson, *GAO Goes To Court: The Impoundment Case*, 11 GAO REVIEW 55, 57 n. 6 (Spring 1976).

In fact, the Justice Department's description of the GAO as an "instrumentality independent of the 'executive branch'" represents a subtle, but potentially significant, rewriting of the law. The 1921 Budget Act, as amended, actually states that the "General Accounting Office is an instrumentality of the United States Government independent of the *executive departments*." 31 U.S.C. 702(a). So under the express terms of the GAO's enabling legislation Congress has not given the Comptroller General total independence from each and every element of the Executive Branch. Moreover, the Comptroller General is required by law to respond directly to the President when he requests information on the work of the GAO or on expenditures and accounting. See 31 U.S.C. 719(a), (f). Such indicia seem at odds with depicting the GAO as a "legislative body" wholly independent of the Executive Branch, as argued by the Department of Justice. *Accord*, H. MANSFIELD, *THE COMPTROLLER GENERAL—A STUDY IN THE LAW AND PRACTICE OF FINANCIAL ADMINISTRATION*, 84-85 (1939); see also Monograph, House Select Committee on Government Organization, 75th Cong., 3d Sess., *Constitutionality of the General Accounting Office* (Comm. Print 1938) (hereinafter "Monograph").

B. The Comptroller General Is an "Officer of the United States" Within the Meaning of the Appointments Clause

The appointment process for the Comptroller General is also inconsistent with a finding that he is "an officer of the Legislative Branch." The 1921 Budget Act, as amended, specifically states that "[t]he Comptroller General and Deputy Comptroller General are appointed by the President, by and with the advice and consent of the Senate." 31 U.S.C. 703(a)(1). Certain members of Congress now play a role in suggesting candidates to the President, but the choice of the nominee remains totally that of the Chief Executive.

In fact, the Supreme Court in *Buckley v. Valeo* specifically distinguished the Comptroller General from appointments such as the Federal Election Commission variety (i.e., legislative officers) found violative of the separation of powers doctrine:

Appellee . . . has relied for analogous support on the existence of the Comptroller General, who as a "legislative officer" has significant duties under the 1971 [Federal Election Campaign] Act . . . But irrespective of Congress' designation . . . the Comptroller General is appointed by the President in conformity with the Appointments Clause. 424 U.S. at 128, n. 165 (emphasis added).

Nor do the permissive statutory limits placed on the removal of the Comptroller General necessarily render him "an officer of the Legislative Branch." See *Buckley v. Valeo*, *supra*, 424 U.S. at 135. The Comptroller Gen-

eral "may be removed at any time" by "impeachment" or by "joint resolution of Congress, after notice and an opportunity for hearing only for" certain enumerated reasons. 31 U.S.C. 703(e). First, it would seem that a purely legislative officer could be removed by Congress without relying on a law or impeachment. A joint resolution of the Congress requires the President's signature to be effective, absent passage over his veto. And under the Constitution impeachment applies to "The President, Vice President and all Civil Officers of the United States. . . ." Article II, Section 4. Legislators themselves appear to have been specifically excluded from the "Civil Officer" category. See 3A HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES (Washington, D.C. 1907) 2294-2318 *et seq.*; *accord*, 17 Op. Att'y Gen. 419, 420 (1882). It would appear reasonable to contend that legislative officers should be similarly exempt.

Moreover, on its face at least, the 1921 Budget Act, as amended, does not expressly make these congressional procedures the *exclusive* means of removing the Comptroller General. See MANSFIELD, *supra*, at 85 n. 19. Even those Supreme Court decisions which permit the Congress to limit the President's power to remove certain officers of the United States (i.e., those like the Comptroller General that do not perform exclusively executive functions) were addressing an "ilimitable" power of removal in the President; at a minimum they obliquely recognized the residual authority of the Chief Executive to remove such an appointee "for cause." See *Weiner v. United States*, 357 U.S. 349, 356 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935). Indeed, there are those who maintain that "the unconstitutionality of the 1921 Budget Act follows from the attempt of Congress to claim the removal power [solely] for itself," including some of the members of Congress who originally approved the 1921 Budget Act. MANSFIELD, *supra*, at 90; see *id.* at 85, 86; see, e.g., 61 CONG. REC. 990-992 (1921) (remarks of Congressman Connally); see generally *Meyers v. United States*, 272 U.S. 52 (1926) (the power to remove executive officers is incidental to the power to appoint).

In any case, the process whereby the Comptroller General obtains and maintains his office is far from persuasive in establishing the Administration's contentions. The functions performed by the Comptroller General in deciding bid protests lend further weight to the conclusion that in that case at least he acts in an executive capacity.

C. The Nature of the Functions to Be Carried Out by the Comptroller General in Deciding Bid Protests Are Not Indicative of a Legislative Officer

The courts have specifically recognized that the GAO performs different functions—some of an investigatory type "auxiliary to the basic functions of the Congress," others while acting "as a member of the Executive branch of the Government." See *United States ex rel. Brookfield Construction Company v. Stewart*, 234 F. Supp. 94, 99 (D.D.C.), *aff'd* 339 F.2d 753 (D.C. Cir. 1964). So has the Department of Justice.

See *Hearings Before Subcomm. of House Comm. on Government Operations on H.R. 12171*, 95th Cong., 2d Sess., 55-56 (Testimony of Deputy Assistant Attorney General Lawrence A. Hammond) (1978). The Comptroller General's involvement in bid protest procedures reflects the latter role rather than the former activity. See *Brookfield Construction Company*, *supra*, 234 F. Supp. at 99-100. This is primarily the case because his bid protest role derives from his statutory authority to settle public accounts. 31 U.S.C. 3526; see *Wheelabrator Corporation v. Chafee*, 455 F.2d 1306, 1313 (D.C. Cir. 1971). In acting on bid protests, the Comptroller General is in effect making advance rulings concerning the propriety of certain payments or disbursements that might be made under the questioned solicitations or contracts.

The history of the comptroller function in the government itself supports the executive status of these bid protest activities. It was the First Congress that established an office of Comptroller of the Treasury in the Executive Branch and gave that office the responsibility of overseeing the accounts of the government. This general responsibility was transferred to the General Accounting Office and, more specifically, to the Comptroller General in 1921. See F. MOSHER, A TALE OF TWO AGENCIES: A COMPARATIVE ANALYSIS OF THE GENERAL ACCOUNTING OFFICE AND THE OFFICE OF MANAGEMENT AND BUDGET 17 (1984). As "the chief accounting officer of the Government" the Comptroller General issues rulings reflecting "approval or disapproval of payments made by Government departments and other agencies." *Brookfield Construction Company*, *supra*, 234 F. Supp. at 99. As Judge Holtzoff observed, "this is an executive function and in performing it the Comptroller General acts as a member of the Executive branch of the Government." *Id.* (emphasis supplied); see also Monograph, *supra*, at 5-8.

It might be contended that because the Comptroller General can only recommend action on the part of the agencies and is not an exclusive forum for relief, that his bid protest functions (and status) are more of an "investigative and informative nature" (i.e., of the legislative variety). *Buckley v. Valeo*, *supra*, at 137. Certainly, GAO's role in the bid protest process has not been taken lightly; over the years it has become "an integral part of the procurement system." Socolar Letter, *supra*, at 2; see also *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1299 (D.C. Cir. 1971). And "[a]s a practical matter, no disbursing officer would make any . . . payments in the face of . . . [the Comptroller General's contrary] ruling." *Brookfield Construction Company*, *supra*, 234 F. Supp. at 100. It is clear that the Congress, in enacting the new bid protest law, "believed that strong enforcement is necessary to insure that the mandate for competition is enforced." H. REP. NO. 861, *supra*, at 1435. Thus, a prime congressional purpose was to buttress the executive role already played by GAO in the bid protest process. The provision regarding attorneys' fees is but one example of congressional expression of that purpose.

Taken together, these factors seem inconsistent with any portrayal of the Comptroller General's status

in deciding bid protests as that of an investigator gathering information in the fashion of a congressional committee. Indeed, the kinds of functions to be performed by the GAO under the new bid protest law (e.g., deciding whether an award or prospective award complies with law and regulations, recommending administrative or requiring certain other relief, including costs and attorneys' fees) are of the type that the Supreme Court has observed may "be exercised only by persons who are 'Officers of the United States.'" See *Buckley v. Valeo*, *supra*, 424 U.S. at 140-141.

D. The Comptroller General's Role in Delaying Award Is Not Comparable to a Legislative Veto

Finally, the attempt to superimpose the principles of the *Chadha* decision on the powers granted the Comptroller General in the bid protest law should not succeed. First, the executive status of the Comptroller General in deciding such protests renders the application of *Chadha* inapposite. But even if he were functioning as a legislative officer in making these decisions, it is the action of the disappointed bidder—not the Comptroller General—that triggers any delay in award or suspension of contract performance. For such delay can only commence when the contracting agency receives notice of a protest, not as a result of any specific exercise of discretionary authority given the Comptroller General. And it is automatically lifted by operation of the law when the GAO makes its recommendation. The law gives the Comptroller General a specific schedule under which the protest must be processed. He may depart from that schedule, but Congress made it crystal clear that it would regard any "extensions as exceptional . . . to be used in unique circumstances only." H. REP. NO. 861, *supra*, 1436. So whatever discretion the Comptroller General does have is extremely limited; there is no authority to interminably delay action so as to create, in effect, a legislative veto condemned by *Chadha*.

CONCLUSION

The sum total of these arguments would appear to give the new bid protest statute a constitutionally acceptable report card. It seems quite likely, however, that the courts will have an opportunity to impose their imprimatur or disapproval. In the same breath that he attacked the new law, the President instructed the Attorney General to "inform all Executive Branch agencies as soon as possible with respect to how they may comply with the provisions of this bill in a manner consistent with the Constitution." Statement of the President, *supra*. And the Assistant Attorney General in charge of the Office of Legal Counsel has now reportedly recommended that federal procurement officials drafting the implementing regulations ignore the challenged provisions. *Washington Post*, October 31, 1984, at A15, Col. 1. To the extent that the Administration finally seeks to hamstring operation of the law based on its constitutional concerns, a court challenge appears to be almost certain. ■

12. November 21, 1984.--Letter from Attorney General William French Smith to Speaker of the House Thomas P. O'Neill containing decision that Federal agencies should not execute certain bid protest provisions (identical letter sent to the President of the Senate; see Appendix C-15 for text of October 17, 1984, memorandum from the Office of Legal Counsel that was included as an attachment to the Attorney General's letter).



Office of the Attorney General

Washington, D. C. 20530

November 21, 1984

Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Section 203(a) of Pub. L. No. 98-411, 98 Stat. 1545, by continuing the authorities contained in § 21 of Pub. L. No. 96-132, 93 Stat. 1049-50, requires that the Attorney General "transmit a report to each House of the Congress" in any case in which the Attorney General "determines that the Department of Justice will contest, or will refrain from defending, any provision of law enacted by the Congress in any proceeding before any court of the United States, or in any administrative or other proceeding, because of the position of the Department of Justice that such provision of law is not constitutional." This letter is submitted consistent with the notification requirement contained under Pub. L. No. 98-411.

Specifically, this letter concerns the Department's decision that federal agencies should not execute certain bid protest provisions of the Competition in Contracting Act of 1984 ("CICA" or "the Act"), which was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984). The first provision requires a procuring agency to suspend or "stay" any procurement if a bid protest is filed prior to the award of a contract or within ten days after the award. The provision then purports to authorize the Comptroller General to lift this "stay" of the procurement by issuing his decision on the bid protest. See revised 31 U.S.C. § 3553(c) and (d). The second provision purports to authorize the Comptroller General to make binding awards of attorneys' fees and bid preparation costs to successful bid protesters. See revised 31 U.S.C. § 3554(c).

The Department of Justice commented on and objected to the constitutionality of similar bid protest provisions when they were under consideration by Congress as part of H.R. 5184. See Letter to Honorable Jack Brooks, Chairman, House Committee on Government Operations, from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (April 20, 1984). When these provisions were subsequently adopted by Congress as part of the Deficit Reduction Act, the President noted in a signing statement his constitutional objections to these provisions and requested the Department of Justice to inform Executive Branch agencies how they might comply with the Act in a manner consistent with the Constitution. See 20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984). Subsequently, the Office of Legal Counsel advised me that these provisions were inconsistent with the constitutionally prescribed separation of powers and should not be executed. See Memorandum for the Attorney General, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, re: Implementation of the Bid Protest Provisions of the Competition in Contracting Act (October 17, 1984). I directed that the Office of Legal Counsel memorandum be transmitted to the Executive Branch agencies responsible for implementing the provisions of the CICA to provide them with the guidance requested by the President.

For the reasons set forth below, I have reached the conclusion that these specific provisions of the CICA are unconstitutional and should not be executed. I have accordingly determined that the Department of Justice will refrain from defending these specific provisions of the CICA in any court, administrative or other proceeding in which execution of the provisions is sought.

The Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921. See 42 Stat. 23 (1921). The Budget and Accounting Act expressly stated that the Comptroller General is "independent of the executive departments" Id. Subsequent legislation made it clear that the Comptroller General is part of the Legislative Branch. The Reorganization Act of 1945 specified that, for the purpose of that Act, the term "agency" meant any executive department, commission, independent establishment, or government corporation, but did "not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." 59 Stat. 616 (1945). The same provision was included in the Reorganization Act of 1949. See 63 Stat. 205 (1949). The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General "as an agent of the Congress" 64 Stat. 835 (1950).

Although the President nominates and, with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General, even for cause. See 31 U.S.C. § 703 (1982). The Comptroller General is appointed for a fifteen-year term, but he may be removed either by impeachment or by a joint resolution of Congress, after notice and an opportunity for hearing, for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1). Given the breadth of the grounds of removal, particularly the terms "inefficiency" and "neglect of duty," Congress enjoys a relatively unlimited power over the tenure in office of the Comptroller General. 1/

Congress expected this broad power of removal to give it the right effectively to control the Comptroller General. The chief House manager of the Budget and Accounting Act stated with respect to the new position of Comptroller General:

This officer is to be the arm of Congress. When he fails to do that work in a strong and efficient way, in a way that Congress would have the law executed, Congress has its remedy, and it can reach out and say if the man is not doing his duty, if he is inefficient or guilty of any of these other things, he can be removed.

61 Cong. Rec. 1080 (1921) (remarks of Rep. Good).

Thus, the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees.

1/ The Supreme Court has recognized that the power to remove an official is necessarily linked to the power to supervise and control the actions of that official. See Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935).

The Supreme Court has most recently and thoroughly considered the scope of Congress's authority to act through its agents in INS v. Chadha, 103 S. Ct. 2764 (1983). In Chadha, the Court declared unconstitutional a one-house legislative veto provision. In so doing, the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto:

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.

103 S. Ct. at 2782. When Congress takes action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," it must act by passing a law and submitting it to the President in accordance with the Presentment Clauses and the constitutionally prescribed separation of powers. Id. at 2784 (emphasis added). The Court emphasized that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." Id. at 2786. 2/

2/ As the Court noted, there are only four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto: the power of the House of Representatives to initiate impeachment, the power of the Senate to try individuals who have been impeached by the House; the power of the Senate to approve or disapprove presidential appointments; and the power of the Senate to ratify treaties negotiated by the President. See 103 S. Ct. at 2786.

Finally, with respect to Congress's power over the Legislative Branch, the Court concluded:

One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Id. at 2786 n.20 (emphasis added).

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional role of the Comptroller General, it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, and he may not take actions that bind individuals and institutions outside the Legislative Branch. He may advise and assist Congress in reviewing the performance of the Executive Branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States. Our analysis of the bid protest provisions of the CICA is based upon these conclusions.

Under the stay provision of the CICA, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision on a bid protest. As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest.

From a constitutional perspective, we find nothing improper in the requirement for a stay, in and of itself. Congress frequently requires Executive Branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so-called "report and wait" requirements were specifically recognized by the Supreme Court in Chadha as a constitutionally acceptable alternative to the legislative veto. See 103 S. Ct. at 2783.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. The CICA gives the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed. This authority amounts, in Chadha's words, to a power that has the "effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." See 103 S. Ct. at 2784. As a constitutional matter, there is very little difference between this power and the power of a legislative veto.

A difficult problem is presented in this instance, however, by the question of the extent to which the unconstitutional provision is severable from the remainder of the CICA. In Chadha, the Court ruled that an unconstitutional provision is generally presumed to be severable. The Court outlined several guidelines with respect to evaluating this issue in a specific instance. First, the Court stated:

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." Buckley v. Valeo, 424 U.S. 1, 108 . . . (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 . . . (1932).

INS v. Chadha, 103 S. Ct. at 2774. Thus, unless there are clear indications that Congress would have intended additional parts of a statute to fall because of the invalidity of a single provision, the invalid provision will be severed. Second, the Court stated that a severability clause is strong evidence that Congress did not intend that the entire statute or any other part of it would fall simply because another provision was unconstitutional. 103 S. Ct. at 2775. Finally, the Court stated that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.' Champlin Refining Co. v. Corporation Comm'n, supra, 286 U.S. at 234." 103 S. Ct. at 2775. The severability issue must be analyzed in light of these principles.

The only aspect of the stay provision that is directly unconstitutional is the provision authorizing the Comptroller General to lift the stay by issuing his decision or finding that a particular protest is frivolous. If this provision alone were severed, the stay would remain in effect indefinitely because there would be no remaining statutory basis for terminating the stay. Although the statute could technically operate this way, as a practical matter this alternative would seem quite draconian because it would permit any bid protester effectively to cancel a procurement simply by filing a protest. It is clear that Congress did not intend such a result when it adopted the CICA. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984).

Alternatively, the stay provisions could be interpreted to require a mandatory stay for a set period of time in order to give the Comptroller General an opportunity to reach a decision on the bid protest. This period of time might be set at 90 working days, which is the period of time established by the CICA as the standard time within which the Comptroller General should issue his decision on a bid protest.

We do not believe, however, that such a reworking of the statute would be consistent with Congress's intent. First, such a construction would involve essentially a redrafting of the stay provision rather than simple severance of the offending sections. Second, and more important, it would mean that any time a bid protest were filed, a procurement would automatically be delayed for 90 working days. Thus, any interested party who might be able to file a protest, however ill-founded, could prevent a procurement for a not insubstantial period of time.

We do not believe that Congress intended the bid protest process to be subject to such potential manipulation. In fact, Congress expressly included the provision granting the Comptroller General the power to dismiss frivolous protests precisely in order to avoid this potential abuse. The conference report stated:

The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a solid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from

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(cont'd)

being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984). Given our conclusion that the provision permitting the Comptroller General to terminate the stay immediately in the case of a frivolous protest is unconstitutional, we do not believe that Congress would have intended for all contracts to be delayed for any set period of time simply upon the filing of a protest, regardless of the good faith of the protester or merit of the protest. Therefore, because the provisions permitting the Comptroller General to terminate the stay must be severed from the statute, we believe that the entire stay provision must be stricken as well. 3/

The provision permitting the Comptroller General to award costs, including attorneys' fees and bid preparation costs, to a prevailing protester, and which purports to require federal agencies to pay such awards "promptly," 31 U.S.C. § 3554(c)(2), suffers from a constitutional infirmity similar to the one that afflicts the stay provision. By purporting to vest in the Comptroller General the power to award damages against an Executive Branch agency, Congress has attempted to give its agent the authority to alter "the legal rights, duties and relations of persons . . . outside the legislative branch." 103 S. Ct. at 2784. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise judicial authority than it may exercise executive authority. See INS v. Chadha, 103 S. Ct. at 2788 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, see Humphrey's Executor v. United States, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

3/ We have no doubt that, under the severability principles set forth above, the stay provision may be severed. The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated.

Based on the foregoing discussion of the law of severability, we believe that the damages provision is clearly severable from the remainder of the CICA. The remainder of the Act is unrelated to the damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute.

We wish to emphasize that we do not question the validity of the remainder of the CICA, and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain Executive Branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch.

My position concerning the execution of these provisions is consistent with the historic practice of the Department of Justice. Although the Department will, in general, defend the constitutionality of a statute that has been challenged in litigation, there are certain rare instances in which it will refrain from that defense or will determine that the statute should not be enforced. In a letter to Senators Thurmond and Biden, dated April 6, 1981, I reiterated this pre-existing policy:

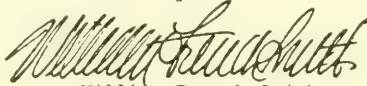
The Department appropriately refuses to defend an act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.

I believe that the specific provisions of the CICA to which this Department has objected fall within both of these narrow categories. First, the unconstitutional provisions tread upon Executive Branch prerogatives by granting to the Legislative Branch power that is inconsistent with its constitutional mandate. Second, I believe that this conclusion with respect to the constitutionality of these provisions is indisputable in light of the Supreme Court's decision in INS v. Chadha, 462 U.S. 919 (1983).

In addition, the Department's decision to advise Executive Branch agencies not to execute the unconstitutional provisions will best assure a rapid and definitive judicial resolution of these constitutional issues. Any bid protester who is aggrieved by an Executive agency's failure to comply with these provisions may raise the constitutional issues for judicial resolution. On the other hand, it is doubtful that anyone would have standing to raise these constitutional issues if the Executive Branch fully executed the subject provisions.

Therefore, I believe that the action I am taking is consistent with my responsibility to support and defend the Constitution and at the same time will facilitate prompt judicial consideration of the constitutional issues.

Sincerely,

A handwritten signature in dark ink, appearing to read "William French Smith", written in a cursive style.

William French Smith
Attorney General

13. November 7, 1984.--GAO Letter Report (B-208159) regarding Justice Department memorandum setting forth the Attorney General's advice on implementation of bid protest provisions (See Appendix C-15 for texts of October 17, 1985, letter and memorandum from the Office of Legal Counsel that was included as an attachment to the GAO report).



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-208159

November 7, 1984

RECEIVED

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

NOV 8 1984
HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

Dear Mr. Chairman:

On October 17, 1984, the Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, distributed a memorandum (a copy of which is enclosed) to the executive branch agencies setting forth the Attorney General's advice with respect to how they should implement the bid protest provisions contained in the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984). The Attorney General's memorandum provides the advice requested by the President of the United States when he signed the act on July 18, 1984.

The Department advises the agencies to disregard both the provision of the act requiring a procuring agency to suspend a procurement (with certain stated exceptions) upon the filing of a bid protest with the Comptroller General until he decides the protest, and the provision permitting the Comptroller General to award costs, including attorneys' fee and bid preparation costs, to a protester and to require agencies to pay such awards promptly. The Department concludes that the remainder of the act's bid protest provisions are valid and that the Comptroller General may continue to issue bid protest decisions.

We want to assure you that the General Accounting Office will implement the bid protest provisions of the act exactly as provided, starting January 15, 1985, when these provisions become effective. Before these provisions were enacted, we expressed our opinion that they were constitutionally valid, and we are not persuaded to the contrary by the October 17 memorandum.

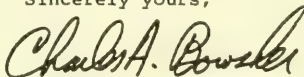
B-208159

We must point out that implementation by the executive branch agencies of the Department's advice will seriously weaken the effectiveness of the bid protest remedy provisions of the act. The purpose of the suspension or stay provision of the act is to permit a protest to be decided while meaningful relief can still be provided. The opportunity to provide meaningful relief is diminished if contract performance has not been suspended while a protest is being decided.

Moreover, we are concerned that if the agencies do not suspend their procurements, the timeliness of their protest submissions may be affected. Many agencies have informally indicated to us that the 25-day report submission requirement of the act may be extremely difficult for them to meet in many cases, even where their procurements are suspended. When their procurements are not suspended, their incentive to meet the 25-day reporting requirement decreases.

We will keep you advised of the developments.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Charles A. Bowsher". The signature is fluid and cursive, with the first name "Charles" and last name "Bowsher" clearly distinguishable.

Comptroller General
of the United States

Enclosure

14. October 29, 1984.--Article entitled "Portions of CICA Bid Protest Provisions Deemed Unconstitutional by Justice Dep't," Federal Contracts Report.



News

Bid Protests

PORTIONS OF CICA BID PROTEST PROVISIONS DEEMED UNCONSTITUTIONAL BY JUSTICE DEP'T

The Justice Department has advised the executive agencies that two of the bid protest provisions contained in the Competition in Contracting Act are unconstitutional and should not be implemented, but officials from the General Accounting Office, the House Government Operations Committee, and the Senate Governmental Affairs Committee charge that Justice has overstepped its bounds.

"Justice's opinion is merely advisory and will have no effect on GAO's bid protest regulations," declared John Brosnan, a senior attorney in GAO's office of the general counsel. "The Act has been passed by Congress and signed by the President and must be enforced by the agencies unless and until a court rules otherwise."

A House committee staff aide asserted that Justice's advice to the agencies to ignore the law of the land "is itself an unconstitutional act."

A Senate committee staff aide agreed, adding that litigation on the matter "is a virtual certainty" once the bid protest provisions take effect next Jan. 15.

Cohen Letter to Attorney General

Sen. William Cohen (R-Me), chairman of the Senate Governmental Affairs oversight subcommittee and one of the two principal architects of CICA, wrote to Attorney General William French Smith Oct. 26 expressing grave concern over the Justice memo. Cohen told Smith that, absent a court ruling, Justice's recommendation to violate a duly enacted statute "raises the most serious questions under the doctrine of the separation of powers."

Cohen recalled that the bid protest provisions have been examined by the GAO, the Congressional Research Service, and legal advisers to the House and the Senate, and that all have concluded the provisions are constitutional.

He stated that such controversial and difficult constitutional issues should be decided after the presentation of divergent views in the courts, "not within the confines of the Department of Justice."

President Reagan, in signing PL 98-369, the measure containing CICA, last July, challenged the validity of the bid protest provisions and instructed Justice to provide guidance to the agencies on complying with the Act in a manner consistent with the Constitution (42 FCR 105).

In an Oct. 17 memorandum to Allan Beres, assistant administrator of the General Services Administration, Justice maintains that the stay provision and the provision permitting GAO to award attorneys' fees and bid preparation costs violate the separation of powers doctrine of the Constitution because the provisions permit the Comptroller General—whom Justice

says is an agent of Congress—to dictate to the executive branch of government what it may and may not do.

Citing the Supreme Court's ruling in *INS v. Chadha* (39 FCR 1205), Justice says the stay provision and the damages provision represent an attempt by Congress to give its agent the authority to alter "the legal rights, duties and relations of persons... outside the legislative branch."

Stay Provision

Regarding the stay provision, Justice has no quarrel with the imposing of a stay. Rather, Justice's concern is the power granted to the Comptroller General to lift a stay, i.e., to dictate when a procurement may proceed.

Under the stay provision, a procuring agency is required to withhold a contract award after receiving notice of a bid protest concerning the award, and to suspend contract performance for a contract awarded within 10 days prior to the filing of a bid protest. The provision requires that a stay remain in effect until the Comptroller General issues a decision on the protest. "As a practical matter," Justice observes, "the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest."

According to Justice, the grant of authority to GAO to lift a stay is analogous to the one-House veto issue in *Chadha* in that it "amounts to a grant of legislative power to an arm of Congress."

Severability Issue

Although Justice finds that there is nothing improper about the requirement for imposing a stay, it concludes that the entire stay provision must be stricken, not just the provision regarding the lifting of the stay.

Justice reasons that if the provision authorizing the Comptroller General to lift a stay alone were eliminated, the stay would remain in effect indefinitely because there would be no statutory basis for terminating it.

In Justice's view, Congress did not intend that a stay be imposed indefinitely, with no provision for lifting it in the event of a frivolous protest. Therefore, Justice concludes that the entire provision should be severed from the act.

On the broader question of whether the stay provision is severable from the remainder of the statute, Justice maintains that it is. "The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated," Justice says.

Attorneys' Fees

Regarding the provision permitting the Comptroller General to award costs, including attorneys' fees and

bid protest preparation costs, to a prevailing protester, Justice believes that it likewise is unconstitutional because it violates the separation of powers doctrine.

However, as with the stay provision, Justice concludes that the damages provision can be severed since the remainder of the Act is "unrelated to the damages damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute."

Justice notes that it does not question the validity of the remainder of CICA, and in particular, the general grant of authority to the Comptroller General to review bid protests. "Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch."

Justice, DOD Views

A Justice Department official who was involved in drafting the memo told FCR that, under Executive Order 12146 (1979), Justice has the authority to settle legal disputes within the executive branch. The official said that Justice's opinion is thus binding on the agencies unless and until it is overturned in court.

FAR Regulations

As for the FAR regulations implementing the competition act, a staff member on the Civilian Agency Acquisition Council said that the CAAC and the DAR Council have decided to issue a separate Federal Acquisition Circular covering the bid protest provisions, and that the circular "will follow the Justice guidance."

Owing to the late date on which the Justice opinion was submitted, the two councils are still working on the bid protest guidance. (The councils have decided to move the bid protest coverage to Part 33 of the FAR.)

However, the councils have completed drafting the final FAR regulations covering the rest of CICA. Those regulations are expected to be issued in a Federal Acquisition Circular on Nov. 1.

Text of the Justice Department memo regarding the bid protest provisions of the Competition in Contracting Act appears at page 755.

Debarment

DOD DEBARRING OFFICIALS NEED BETTER TIES WITH INVESTIGATORS, IG RECOMMENDS

The Defense Department's debarring officials should improve communications with DOD investigative agencies regarding procurement fraud cases, according to a report by the Defense Inspector General.

The report, "Review of Suspension and Debarment Activities within the Department of Defense," also urges DOD debarring officials to increase their use of pre-indictment suspensions to protect the government's interests, to raise their staffing levels, and to develop a system for coordinating nonresponsibility

determinations with the debarment and suspension process.

The IG's review of the 120 significant procurement fraud cases reported to Congress in FY 1981 and FY 1982 found that only 79 had been subject of debarment or suspension action. The cases resulted in only eight suspensions and eleven debarments and 47 cases remained pending. The investigators found that 41 cases had not been submitted for debarment or suspension action, including seven in which the contractor had been convicted of fraud.

In addition, DOD's debarment and suspension officials identified 213 procurement fraud cases during the FY 1981-2 period. The IG staff reviewed 108 of those cases, and found that 59 had resulted in debarment or suspension; another 32 cases were still pending.

Debarment/Suspension Structures Differ

The IG report, dated May 1984 but only recently available, notes that the debarment and suspension procedures differ among the military departments and the Defense Logistics Agency.

The Army's debarring official is the assistant judge advocate general for civil law; cases are referred to him by contracting activities or the Army's Criminal Investigation Command. The Navy's procedure is similar, with cases coming from contracting activities or the Naval Investigative Service; the commander of the naval materiel command is the Navy's debarring official.

In contrast, the Air Force directorate of contracting and manufacturing policy at the Pentagon is responsible for developing all Air Force suspension and debarment cases. Finally, the Defense Logistics Agency's debarment and suspension authority is vested in the general counsel, a post now held by Karl Kabeiseman. DLA debarment and suspension cases are initiated at the regional counsel level, and then referred to Kabeiseman's office.

Improvements Needed

The Army's debarment and suspension activity has been plagued by staffing problems, according to the IG. "Over 100 suspension/debarment cases were assigned to five attorneys who had significant litigation-related responsibilities." In addition, there is no direct contact between the assistant judge advocate general for civil law and Army procurement commands, with regard to matters other than debarment and suspension. Thus, the assistant judge advocate general is not routinely involved in Army procurement matters. Furthermore, some attorneys who work on debarment cases don't have experience in procurement or fraud investigation, the report says.

The Naval Materiel Command has failed to utilize its investigative resources—either its own investigators or NIS staff—to ensure that debarment and suspension cases are developed in a timely manner, the report contends. "Many Navy suspension and debarment cases were untimely, and often suspension or debarment action did not take place for months or years after an indictment or conviction." In addition, no sanctions were imposed in numerous cases involving contractors that had been convicted of bribery, the report adds. Nor were efforts were made to coordi-

15. October 17, 1984.--Letter from Acting Assistant Attorney General Larry L. Simms, Office of Legal Counsel, to Allan W. Beres, Assistant Administrator, Office of Acquisition Policy, General Services Administration, transmitting copy of implementation memorandum for distribution to the Civilian Agency Acquisition Council.



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

OCT 17 1984

Mr. Allan W. Beres
Assistant Administrator
Office of Acquisition Policy
General Services Administration
18th & F. Streets, N.W.
Washington, D.C. 20405

RECEIVED

NOV 8 1984

HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

Dear Mr. Beres:

On July 18, 1984, the President signed H.R. 4170, the Deficit Reduction Act of 1984, which contained the Competition in Contracting Act of 1984 (the Act). At the time he signed the bill, the President issued a statement in which he questioned the constitutionality of several provisions of the Act that purport to vest the Comptroller General with authority to bind the Executive Branch with respect to certain aspects of the bid protest process. The President requested the Attorney General to advise Executive Branch agencies concerning how they may comply with the provisions of the Act in a manner consistent with the Constitution.

We have prepared a memorandum (a copy of which is enclosed) that responds to the President's request and sets forth our legal advice with respect to how Executive Branch agencies should implement the Act. We would greatly appreciate it if you would distribute this memorandum to the Civilian Agency Acquisition Council and any other civilian agency that may be involved with the implementation of the Act.

Sincerely,

Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel

cc: Allie B. Latimer



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

OCT 17 1984

MEMORANDUM FOR
THE ATTORNEY GENERALRe: Implementation of the Bid Protest Provisions of the
Competition in Contracting Act

This memorandum responds to the President's request that this Department advise Executive Branch agencies regarding how they may implement the bid protest provisions of the Competition in Contracting Act of 1984 ("CICA" or "the Act"), which was enacted as part of the Deficit Reduction Act of 1984. Pub. L. No. 98-369, 98 Stat. 494 (1984). In a signing statement on the Deficit Reduction Act, the President, on the advice of this Department, raised constitutional objections to certain provisions that delegate to the Comptroller General the power to perform duties that may not be carried out by the Legislative Branch. The President instructed this Department to advise Executive Branch agencies with respect to how they could comply with the Act in a manner consistent with the Constitution. This memorandum provides the advice requested by the President.

I

BACKGROUND

The new bid protest provisions were enacted as Subtitle D of the CICA. These provisions expressly permit any "interested party" 1/ to file "[a] protest concerning an alleged violation

1/ "Interested party" is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." 31 U.S.C. § 3551. (Citations to the new bid protest provisions will be to the United States Code sections, as those sections are set forth in the CICA.)

of a procurement statute or regulation . . . , and authorize the Comptroller General to decide such a protest under procedures to be established by the Comptroller General. See 31 U.S.C. § 3552. These provisions provide the first explicit statutory authorization for the Comptroller General's review of bid protests. Previously, all bid protests were considered on the basis of regulations published under the more general statutory provision that purports to authorize the Comptroller General to settle the accounts of the United States Government. See 31 U.S.C. § 3526.

The CICA requires the Comptroller General to notify the federal agency involved in the protest, which is then required to submit to the Comptroller General a complete report on the protested procurement, "including all relevant documents," within 25 working days of the agency's receipt of notice. 31 U.S.C. § 3553(b). As a general rule, the CICA requires the Comptroller General to issue a final decision on a protest within 90 working days from the date the protest is submitted to the Comptroller General. These time deadlines, however, may be altered by the Comptroller General if he determines and states in writing that the specific circumstances of the protest require a longer period. The Act also provides for a so-called "express option" for deciding protests that the "Comptroller General determines suitable for resolution within 45 calendar days from the date the protest is submitted." Finally, the Comptroller General may dismiss a protest that the "Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest." 31 U.S.C. § 3554(a).

The Act expressly requires that if a protest is filed prior to a contract award, "a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending." 31 U.S.C. § 3553(c)(1). The procuring agency may avoid this "stay" only if the "head of the procuring activity" makes a "written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General" The Comptroller General must be advised of this finding, and the finding may not be made "unless the award of the contract is otherwise likely to occur within 30 days thereafter." See 31 U.S.C. § 3553(c)(3).

If a bid protest is filed within ten days after the date a contract is awarded, the procuring agency is required "upon receipt of that notice, immediately [to] direct the contractor

to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending." 31 U.S.C. § 3553(d)(1). As is true with respect to a pre-award protest, the head of the procuring activity may "waive" the "stay" upon a written finding that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest." In addition, however, the Act provides an additional ground for waiver of a post-award stay upon a written finding "that performance of the contract is in the best interests of the United States." 31 U.S.C. § 3553(d)(2).

With respect to remedies, the Act authorizes the Comptroller General to determine whether a solicitation or proposed award complies with applicable statutes and regulations and, if not, to recommend that the procuring agency take certain specified types of action. The Act does not purport to give the Comptroller General the authority to issue binding decisions on the merits of the protest. The Act does, however, state that if the Comptroller General determines that a solicitation or award does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of "filing and pursuing the protest, including reasonable attorneys' fees" and "bid and proposal preparation." 31 U.S.C. § 3554(c)(1). In addition, the Act states that these monetary awards "shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services." 31 U.S.C. § 3554(c)(2).

Finally, the Act requires the head of a procuring activity to report to the Comptroller General if the procuring agency has not fully implemented the Comptroller General's recommendations within 60 days after receipt of those recommendations. The Comptroller General is then required to submit a yearly report to Congress describing each instance in which a federal agency did not fully implement the Comptroller General's recommendations. 31 U.S.C. § 3554(e)(2).

The Department of Justice commented on similar bid protest provisions when they were under consideration by Congress as part of H.R. 5184. See Letter to Honorable Jack Brooks, from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (April 20, 1984). At that time the Department specifically objected to the stay provisions on the ground that they would unconstitutionally vest

an arm of the Legislature with the power to control Executive Branch actions. The Department specifically concluded that the stay provision "must be deleted because of this constitutional infirmity." *Id.* at 3. In addition, the Department objected to the provision in H.R. 5184 purporting to authorize the Comptroller General to enter a legally binding award of attorney's fees and bid preparation costs. We pointed out that this provision unconstitutionally granted the Comptroller General executive or judicial authority in a manner inconsistent with the separation of powers and that, accordingly, the section "must be deleted in order to remove this substantial concern." *Id.* The Department's objections went unheeded, and both provisions were enacted into law.

When the Deficit Reduction Act of 1984 was presented to the President for his signature, he specifically objected in a signing statement to the bid protest provisions upon which the Department had previously commented:

I am today signing H.R. 4170. In signing this important legislation, I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch. This administration's position on the unconstitutionality of these provisions was clearly articulated to Congress by the Department of Justice on April 20, 1984. I am instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply with the provisions of this bill in a manner consistent with the Constitution.

20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

II

THE CONSTITUTIONAL ROLE OF THE COMPTROLLER GENERAL

In order to analyze the constitutionality of the bid protest provisions of the CICA, it is necessary first to understand what types of functions the Comptroller General may (and may not)

perform under the constitutionally prescribed separation of powers. This analysis first involves consideration of where the Comptroller General fits within the tripartite structure established by the Constitution. It is then necessary to determine, given the Comptroller General's place in that structure, what duties he may constitutionally perform.

A. The Comptroller General's Position in the Tripartite Structure of the Federal Government

The Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921. See 42 Stat. 23 (1921). The Budget and Accounting Act expressly stated that the Comptroller General is "independent of the executive departments" *Id.* Subsequent legislation made it clear that the Comptroller General is part of the Legislative Branch. The Reorganization Act of 1945 specified that, for the purpose of that Act, the term "agency" meant any executive department, commission, independent establishment, or government corporation, but did "not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." 59 Stat. 616 (1945). The same provision was included in the Reorganization Act of 1949. See 63 Stat. 205 (1949). The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General "as an agent of the Congress" 64 Stat. 835 (1950).

Although the President nominates and, with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General, even for cause. See 31 U.S.C. § 703 (1982). The Comptroller General is appointed for a fifteen-year term, but he may be removed either by impeachment or by a joint resolution of Congress, after notice and an opportunity for hearing, for "(i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1). Given the breadth of the grounds of removal, particularly the terms "inefficiency" and "neglect of duty," Congress enjoys a relatively unlimited power over the tenure in office of the Comptroller General. 2/

2/ The Supreme Court has recognized that the power to remove an official is necessarily linked to the power to supervise and control the actions of that official. See Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935).

This broad power of removal was intended to give Congress the right effectively to control the Comptroller General, as the following excerpts from the legislative history of the Budget and Accounting Act demonstrate:

MR. FESS. In other words, the man who is appointed may be independent of the appointing power, and at the same time if the legislative branch finds that he is not desirable, although he may be desirable to the appointing power, the legislative branch can remove him?

MR. HAWLEY. Yes;

58 Cong. Rec. 7136 (1919).

[I]f the bill is passed this would give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal.

Id. at 7211 (remarks of Rep. Temple).

On the basis of these statutory provisions, it has become generally accepted that the Comptroller General is an arm of Congress and is within the Legislative Branch. The Department of Justice has consistently taken the view that the Comptroller General is a "legislative officer." See, e.g., Testimony of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, before the Subcommittee on Legislation and National Security, House Committee on Government Operations, 95th Cong., 2d Sess. (June 26, 1978). The courts have also reached the conclusion that the Comptroller General is "an arm of the legislature." See Delta Data Systems Corp. v. Webster, No. 84-5356, slip op. at 9 n.1 (D.C. Cir. Sep. 21, 1984); M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C. Cir. 1971). In addition, scholars and commentators have recognized the position of the Comptroller General within the Legislative Branch and his direct accountability to Congress. See R. Brown, The GAO: Untapped Source of Congressional Power (1970); F. Mosher, The GAO: The Quest for Accountability in American Government (1979); Willoughby, The Legal Status and Functions of the General Accounting Office of the National Government (1927); Cibinic and Lasken, The Comptroller General and Government Contracts, 38 Geo. Wash. L. Rev. 349 (1970); see also The United States Government Manual 1984/85 at 40.

The extent of the Comptroller General's direct accountability to Congress is perhaps best demonstrated by publications of Congress itself and of the General Accounting Office (GAO), which the Comptroller General heads. 3/ In 1962, the Senate Committee on Government Operations published a report that described the GAO as:

a nonpolitical, nonpartisan agency in the legislative branch of the Government created by the Congress to act in its behalf in examining the manner in which Government agencies discharge their financial responsibilities with regard to public funds appropriated or otherwise made available to them by the Congress and to make recommendations looking to greater economy and efficiency in public expenditures.

S. Doc. No. 96, 87th Cong., 2d Sess., Functions of the U.S. General Accounting Office 1 (1962).

A recent publication of the GAO states that although the Comptroller General is appointed by the President with the advice and consent of the Senate, the Comptroller General has "line responsibility to the Congress alone." United States General Accounting Office, GAO 1966-1981, An Administrative History 84 (1981). The same publication states that while "the Comptroller General has been established by the Congress with a great measure of discretion in independent action, he is fully accountable to the Congress. The Congress has by law and by practice exercised its accountability in several different ways." Id. at 258. This direct accountability undoubtedly has an impact on the positions and conclusions the Comptroller General reaches on public issues. For example, the GAO has stated that "as an agent of Congress, GAO has always considered it inappropriate to question the constitutionality of a statute enacted by the Congress" General Accounting Office, Principles of Federal Appropriations Law 1-7 (1982).

3/ Because the Comptroller General and the GAO are both "a part of the legislative branch of the Government," we treat them as equivalents for the purposes of this constitutional analysis. See Reorganization Act of 1949, 63 Stat. 205 (1949).

Thus, the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees. The scope of this power is discussed below.

**B. The Duties That May Constitutionally Be Performed by
An Agent of the Legislative Branch**

The fundamental principle of the United States Constitution is the division of federal power among three branches of government. The term "separation of powers" does not appear in the Constitution nor does that concept manifest itself in one specific provision of the Constitution. The Supreme Court has emphasized, however, that the separation of powers "is at the heart of our Constitution . . .," and the Court has recognized "the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another." Buckley v. Valeo, 424 U.S. 1, 119-20 (1976). "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." Id. at 124. "The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers" INS v. Chadha, 103 S. Ct. 2764, 2781 (1983). In The Federalist No. 47, James Madison defended this tripartite arrangement in the Constitution by reference to Montesquieu's well-known maxim that the legislative, executive, and judicial departments should be separate and distinct:

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would.

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then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

The Federalist No. 47, 303 (New American Library Ed. 1961) (emphasis in original); see Buckley v. Valeo, 424 U.S. 1, 120-21 (1976).

The division of delegated powers was designed "to assure, as nearly as possible, that each Branch of Government would confine itself to its assigned responsibility." INS v. Chadha, 103 S. Ct. at 2784. This division obliges the branches both to confine themselves to their constitutionally prescribed roles and not to interfere with exercise by the other branches of their constitutional duties. Thus, the doctrine of separation of powers "may be violated in two ways. One branch may interfere impermissibly with the other's performance of its constitutionally assigned function. Alternatively the doctrine may be violated when one branch assumes a function that more properly is entrusted to another." Id. at 2790 (Powell, J. concurring) (citations omitted).

This constitutionally prescribed separation of powers is not merely a theoretical concept; it creates enforceable limits upon the powers of each branch. The Supreme Court has emphasized that it "has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." Buckley v. Valeo, 424 U.S. at 123. Thus, the separation of powers is a vital part of the structure of the Constitution and the federal government, and it operates as an enforceable limit on the ability of one branch to assume powers that properly belong to another.

At various times in the Nation's history, the Supreme Court has acted to restrain each of the other branches from overstepping its proper constitutional role. In particular, the Court has been sensitive to the need to limit Congress to the performance of its legislative duties and not permit it to usurp executive or judicial functions. The Court has observed that because of the Framers' specific concerns about the potential abuse of legislative power, "barriers had to be erected to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments." United States v. Brown, 381 U.S. 437, 444 (1965). In Springer v. The Philippine Islands, 277 U.S. 189 (1928), the Court stated:

Legislative power, as distinguished from executive power, is the authority to make

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laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

277 U.S. at 202.

In Myers v. United States, 272 U.S. 52 (1926), the Court held that Congress could not limit or interfere with the President's ability to remove executive officials:

Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices [T]he provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, [senate advice and consent] in the work of the executive, are limitations to be strictly construed and not to be extended by implication

272 U.S. at 164.

In Buckley v. Valeo, the Court ruled that Congress was barred by the Appointments Clause from appointing Officers of the United States, whom it defined as those "exercising significant authority pursuant to the laws of the United States." 424 U.S. at 126. In so holding, the Court expressly recognized that Congress's broad power under the Necessary and Proper Clause extends only so far as its legislative authority, and does not expand that authority to encompass the exercise of executive powers:

The proper inquiry when considering the Necessary and Proper Clause is not the authority of Congress to create an office or a commission, which is broad indeed, but rather its authority to provide that its own officers may make appointments to such office or commission.

So framed, the claim that Congress may provide for this manner of appointment

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under the Necessary and Proper Clause of Art. I stands on no better footing than the claim that it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in § 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint Officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

Id. at 134-35.

Finally, the Supreme Court has most recently and thoroughly considered the scope of Congress's authority to act other than by plenary legislation in INS v. Chadha. In Chadha, the Court declared unconstitutional a one-house legislative veto provision. In so doing, the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto:

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.

103 S. Ct. at 2782. When Congress takes action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," it must act by passing a law and submitting it to the President

in accordance with the Presentment Clauses and the constitutionally prescribed separation of powers. Id. at 2784 (emphasis added). The Court emphasized that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." Id. at 2786. 4/

Finally, with respect to Congress's power over the Legislative Branch, the Court concluded:

One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each House has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Id. at 2786 n.20 (emphasis added).

These principles have never been directly applied by a court to establish the constitutional limits on Congress's authority to assign duties to the Comptroller General. In

4/ As the Court noted, there are only four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto: the power of the House of Representatives to initiate impeachment, the power of the Senate to try individuals who have been impeached by the House; the power of the Senate to approve or disapprove presidential appointments; and the power of the Senate to ratify treaties negotiated by the President. See 103 S. Ct. at 2786.

particular, we are aware of no court decision that has ever held that the Comptroller General may constitutionally perform executive duties or take actions that bind individuals outside the Legislative Branch. 5/ Some courts have, in dictum, noted that the Budget and Accounting Act purports to give the Comptroller General broad power to bind the Executive Branch. See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1 (1927); United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 100 (D.D.C.), aff'd, 339 F.2d 753 (D.C. Cir. 1964). Other courts have stated, solely on the basis of statutory language and without considering any possible constitutional issues, that the Comptroller General's settlement of accounts is binding on the Executive Branch. See United States v. Standard Oil Co., 545 F.2d 624, 637-38 (9th Cir. 1976); Burkley v. United States, 185 F.2d 267 (7th Cir. 1950); Pettit v. United States, 488 F.2d 1026 (Ct. Cl. 1973). In none of these cases, however, did the courts consider generally the scope of authority that could constitutionally be assigned to the Comptroller General or, specifically, whether the Constitution would permit the Comptroller General, as an arm of Congress, to take action affecting the rights or obligations of Executive Branch officials or private citizens.

Other cases have expressly recognized that, in the context of the Comptroller General's current review of bid protests, the authority of the Comptroller General is purely advisory and does not bind the Executive Branch. See Delta Data Systems Corp. v. Webster, No. 84-5356, slip op. at 8-9 (D.C. Cir. Sep. 21, 1984); Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1313 (D.C. Cir. 1971); Aero Corp. v. Department of the Navy, 540 F. Supp. 180, 206 (D.D.C. 1982); Simpson Electric Co. v. Seamans, 317 F. Supp. 684, 686 (D.D.C. 1970).

5/ In Buckley v. Valeo, the Court noted that the Comptroller General "is appointed by the President in conformity with the Appointments Clause." 424 U.S. at 128 n.165. This reference was not, however, an indication that the Comptroller General is authorized to perform executive responsibilities, but rather, simply responded to an argument made by Congress in Buckley that the Office of Comptroller General was precedent supporting Congress's asserted right to make certain types of appointments.

Indeed, the United States Court of Appeals for the District of Columbia Circuit has recently recognized that there "might be a constitutional impediment to such a binding effect. See INS v. Chadha, 103 S. Ct. 2764 (1983)." Delta Data Systems Corp. v. Webster, slip op. at 9 n.1.

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional role of the Comptroller General, it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, and he may not take actions that bind individuals and institutions outside the Legislative Branch. He may advise and assist Congress in reviewing the performance of the Executive Branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States. Our analysis of the bid protest provisions of the CICA is based upon these conclusions.

III

THE CONSTITUTIONALITY OF THE BID PROTEST PROVISIONS OF THE CICA

Given the foregoing constitutional principles, there are two provisions of the CICA that raise significant constitutional problems: (1) the provision requiring a procuring agency to stay a procurement pending resolution by the Comptroller General of a bid protest; and (2) the provision authorizing the Comptroller General to require a procuring agency to pay certain costs, including attorneys' fees and bid preparation costs.

A. The Stay Provision

Under the stay provision of the CICA, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision on a bid protest. As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest.

From a constitutional perspective, we find nothing improper in the requirement for a stay, in and of itself. Congress frequently requires Executive Branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so-called "report and wait" requirements were specifically recognized by the Supreme Court in Chadha as a constitutionally acceptable alternative to the legislative veto. See 103 S. Ct. at 2783.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. The CICA gives the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed. This authority amounts, in Chadha's words, to a power that has the "effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." See 103 S. Ct. at 2784. As a constitutional matter, there is very little difference between this power and the power of a legislative veto.

A similar issue was raised in American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982). In that case, the court of appeals considered the validity of a statute that required the Department of Housing and Urban Development to suspend any reorganization until it received approval from the House and Senate Committees on Appropriations. The court ruled that this provision could be interpreted simply as a form of legislative veto, but it also stated:

The provision can also be taken as granting the Appropriations Committees the power to lift a congressionally-imposed restriction on the use of appropriated funds. In this light, the directive is nothing more or less than a grant of legislative power to two congressional committees. It is plainly violative of article I, section 7, which prescribes the only method through which legislation may be enacted and which "restrict[s] the operation of the legislative power to those policies which meet the approval of three constituencies, or a super-majority of two."

697 F.2d at 306, citing Consumer Energy Council v. FERC, 673 F.2d 425, 464 (D.C. Cir. 1982), aff'd 103 S. Ct. 3556 (1983). Similarly, the grant to the Comptroller General of the power to lift the stay imposed under the CICA amounts to a grant of

legislative power to an arm of Congress. This grant is clearly inconsistent with the principles established by the Supreme Court in Chadha, which were accurately anticipated by the D. C. Circuit in Pierce.

A difficult problem is presented in this instance, however, by the question of the extent to which the unconstitutional provision is severable from the remainder of the CICA. In Chadha, the Court ruled that an unconstitutional provision is generally presumed to be severable. The Court outlined several guidelines with respect to evaluating this issue in a specific instance. First, the Court stated:

Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not" Buckley v. Valeo, 424 U.S. 1, 108 . . . (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 . . . (1932).

INS v. Chadha, 103 S. Ct. at 2774. Thus, unless there are clear indications that Congress would have intended additional parts of a statute to fall because of the invalidity of a single provision, the invalid provision will be severed. Second, the Court stated that a severability clause is strong evidence that Congress did not intend that the entire statute or any other part of it would fall simply because another provision was unconstitutional. 103 S. Ct. at 2775. Finally, the Court stated that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.' Champlin Refining Co. v. Corporation Comm'n, supra, 286 U.S. at 234." 103 S. Ct. at 2775. The severability issue must be analyzed in light of these principles.

The only aspect of the stay provision that is directly unconstitutional is the provision authorizing the Comptroller General to lift the stay by issuing his decision or finding that a particular protest is frivolous. If this provision alone were severed, the stay would remain in effect indefinitely because there would be no remaining statutory basis for terminating the stay. Although the statute could technically operate this way, as a practical matter this alternative would seem quite draconian because it would permit any bid protester effectively to cancel a procurement simply by filing a protest.

It is clear that Congress did not intend such a result when it adopted the CICA. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984).

Alternatively, the stay provisions could be interpreted to require a mandatory stay for a set period of time in order to give the Comptroller General an opportunity to reach a decision on the bid protest. This period of time might be set at 90 working days, which is the period of time established by the CICA as the standard time within which the Comptroller General should issue his decision on a bid protest.

We do not believe, however, that such a reworking of the statute would be consistent with Congress's intent. First, such a construction would involve essentially a redrafting of the stay provision rather than simple severance of the offending sections. Second, and more important, it would mean that any time a bid protest were filed, a procurement would automatically be delayed for 90 working days. Thus, any interested party who might be able to file a protest, however ill-founded, could prevent a procurement for a not insubstantial period of time.

We do not believe that Congress intended the bid protest process to be subject to such potential manipulation. 6/ In fact, Congress expressly included the provision granting the

6/ We are informed by representatives of the Department of Defense that there would be a significant question concerning the proper allocation of costs incurred by an otherwise successful bidder during any period in which a stay were in effect. If Congress desires to enact a bid-protest system in which frivolous protests stay the award of a contract for 90 days (or any other set period of time), thereby potentially increasing substantially the ultimate cost to the Government of a procurement because the original, successful bidder will have to pass on to the Government the costs incurred because of the delay, Congress may do so. We would not, however, assume an intent on the part of Congress to do so; if Congress intends to legislate such an arguably inefficient procurement system, we believe it should be required to do so expressly in order to provide for the political accountability that is built into our constitutional system.

Comptroller General the power to dismiss frivolous protests precisely in order to avoid this potential abuse. The conference report stated:

The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a solid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984). Given our conclusion that the provision permitting the Comptroller General to terminate the stay immediately in the case of a frivolous protest is unconstitutional, we do not believe that Congress would have intended for all contracts to be delayed for any set period of time simply upon the filing of a protest, regardless of the good faith of the protester or merit of the protest. Therefore, because the provisions permitting the Comptroller General to terminate the stay must be severed from the statute, we believe that the entire stay provision must be stricken as well. 7/

This result is consistent with the approach taken by the United States Court of Appeals for the District of Columbia Circuit in American Federation of Government Employees v. Pierce. In that case, as previously discussed, the court declared unconstitutional a provision that required a stay of any reorganization plan within HUD until two congressional committees had given specific approval. The court recognized that the only directly unconstitutional aspect of this statute was the section that gave the congressional committees the power to terminate the stay. 697 F.2d at 307. Although the court could have severed that provision alone from the statute and left the stay provision in effect, it determined that "the prohibition on HUD reorganization [was] 'inextricably bound' to the invalid committee approval device." Id. (citation omitted). In the present instance, the two provisions seem equally inextricably bound, and we believe that Congress would not have enacted the stay provision "in the absence of the invalidated provision." See Consumer Energy Council v. FERC, 673 F.2d at 442.

7/ We have no doubt that, under the severability principles set forth above, the stay provision may be severed. The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated.

B. The Provision for Awarding Attorneys' Fees and Bid Preparation Costs

The provision permitting the Comptroller General to award costs, including attorneys' fees and bid preparation costs, to a prevailing protester, and which purports to require federal agencies to pay such awards "promptly," 31 U.S.C. § 3554(c)(2), suffers from a constitutional infirmity similar to the one that afflicts the stay provision. By purporting to vest in the Comptroller General the power to award damages against an Executive Branch agency, Congress has attempted to give its agent the authority to alter "the legal rights, duties and relations of persons . . . outside the legislative branch." 103 S. Ct. at 2784. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise judicial authority than it may exercise executive authority. See INS v. Chadha, 103 S. Ct. at 2788 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, see Humphrey's Executor v. United States, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

Based on our discussion of the law of severability in Part III.A. above, we believe that the damages provision is clearly severable from the remainder of the CICA. The remainder of the Act is unrelated to the damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute.

We wish to emphasize that we do not question the validity of the remainder of the CICA, and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain Executive Branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch.

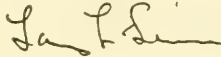
IV

CONCLUSION

In summary, we believe that the stay provisions of the CICA, now in 31 U.S.C. § 3553(c) and (d), are unconstitutional and should be severed in their entirety from the remainder of the Act. In addition, the damages provision contained in 31 U.S.C. § 3554(c) is similarly unconstitutional and should be severed from the rest of the CICA. Because these provisions are unconstitutional, they can neither bind the Executive Branch nor provide authority for Executive Branch actions. Thus, the Executive Branch should take no action, including the issuance of regulations, based upon these invalid provisions.

We recommend that Executive Branch agencies implement these legal conclusions in the following manner. First, with respect to the stay provisions, all executive agencies should proceed with the procurement process as though no stay provision were contained in the CICA. We recognize that, under the Federal Acquisition Regulation, executive agencies have voluntarily agreed to stay procurements pending the resolution of bid protests in certain circumstances. See 48 C.F.R. § 14.407-8(b)(4). Executive agencies may continue to comply with these and other applicable regulations. These regulations may not, however, be based upon the invalid authority of the stay requirements of the CICA.

With respect to the damages provision contained in 31 U.S.C. § 3554(c), executive agencies should under no circumstances comply with awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General. We would further recommend that executive agencies not respond to the Comptroller General on the merits of any application for a damage award except to state that the Executive Branch regards the damages provision as unconstitutional.



Larry L. Simms
Acting Assistant Attorney General
Office of Legal Counsel

1b. October 2, 1984.--Memorandum from Steven R. Ross, General Counsel to the Clerk of the House, to Chairman Jack Brooks regarding constitutionality of the Competition in Contracting Act.

Benjamin J. Guthrie
Clerk

M. Raymond Colley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

October 2, 1984

MEMORANDUM

TO: The Honorable Jack Brooks
Chairman
Committee on Government Operations

FROM: Steven R. Ross *SRR*
General Counsel to the Clerk

Charles Tiefer *CT*
Assistant General Counsel to the Clerk

SUBJECT: Constitutionality of the Competition in Contracting Act

We have been asked to address the constitutionality of the Competition in Contracting Act of 1984 ("the Act") (enacted as Title VII of the Deficit Reduction Act of 1984), and in particular the new 35 U.S.C. §§ 3551-3556 (enacted by section 2741 of the Act). On April 20, 1984, the Department of Justice presented its views on the predecessor bill of the Committee on Government Operations, H.R. 5184.^{1/} The Department's analysis focused on a key provision, section 204(b)(2), which provides for a stay of an agency's award of a contract upon notification of the agency that bid illegalities are being protested. As its conclusion, the Department stated that this provision is

^{1/} Letter to Honorable Jack Brooks, Chairman, Committee on Government Operations, from Robert A. McConnell, Assistant Attorney General for Legislative Affairs, of April 20, 1984 ("DOJ Letter").

unconstitutional as violating the separation of powers. We disagree.

Statutory Mechanism

A review of the statutory mechanism is appropriate, particularly since the Justice Department's analysis centers on its assertion that the statute is a means for the Comptroller General to put a permanent hold on contracting. The Competition in Contract Act of 1984 seeks to deal with endemic agency failures of competitive procurement by insuring proper proceedings for charges of illegalities. It works through an automatic stay and a recommendation by the Comptroller General.^{2/} Under the Act, an "interested party," meaning an "actual or prospective bidder or offeror,"^{3/} can file a protest concerning alleged violations of procurement statutes or regulations. The agency immediately receives notice of the protest, section 3553(b)(1), and the agency's receipt of notice automatically stays the award of any contract,^{4/} absent "urgent

^{2/} Legislative hearings concerning the act were held on March 27 and 29, 1984.

^{3/} Section 3551 provides definitions.

^{4/} "[A] contract may not be awarded in any procurement after the Federal agency has received notice of a protest...while the protest is pending." Section 3553(b)(2).

and compelling circumstances."^{5/}

While that automatic stay is in effect, the agency and the Comptroller General proceed with the bid protest. Within twenty-five days after notification of the protest (subject to shortening or lengthening for various reasons),^{6/} the agency submits "a complete report (including all relevant documents) on the protested procurement." Section 3553(b)(2).^{7/} Then, the Comptroller General decides the protest, by "determin[ing] whether the solicitation, proposed award, or award complies with statute and regulation." Sections 3552, 3553(a), and 3554(b)(1). He must "issue a final decision concerning a protest within 90 working days." Section 3554(a)(1).^{8/}

^{5/} An escape clause allows "[t]he head of the procuring activity ... [to] authorize the award of the contract (notwithstanding a protest...) ... upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision" on the protest. Section 3553(c)(2)(A).

If the contract has been awarded before notice of a protest, performance ceases, section 3553(d)(1), unless the head of the procuring activity makes a similar written finding about "urgent and compelling circumstances." Section 3553(d)(2).

^{6/} Section 3554(a)(2) provides an express procedure. Section 3554(a)(3) provides for the Comptroller General to dismiss protests which on their face do not state a valid basis.

^{7/} Interested parties receive that report and relevant unprivileged documents. Section 3553(f).

^{8/} The Comptroller General can take longer than 90 days if he "determines and states in writing the reasons that the specific circumstances of the protest require a longer period," Section 3554(a)(1).

If "the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency" take one of several steps, such as terminating the contract, issuing a new solicitation, or recompeting the contract. Section 3554(b)(1).^{9/} Also, the Comptroller General has discretion to declare the protester to be entitled to its costs for filing and pursuing the protest and for bid and proposal preparation, to be paid by the agency. Section 3554(c).

In its challenge to this provision, the Justice Department characterizes the provision as providing the GAO with "the power effectively to block Executive Action...." DOJ Letter at 3. The Justice Department letter states that the Act's stay provision "clearly contemplates the possibility that with respect to some contracts, the agency will simply be put on permanent 'hold' until after GAO has announced its 'recommendation.'" Id. One reason for the Justice Department's assertion is apparently that H.R. 5184, which it analyzed, did not set a 90-day time limit (absent particular circumstances) on Comptroller General consideration; the conference committee set that limit on the statute. In any event, the Department likens the Act's stay to a

^{9/} An agency which does not fully implement those recommendations within 60 days must so report to the Comptroller General, and he, in turn, reports annually on instances of non-implementation. Section 3554(e).

legislative veto or committee approval provision, citing INS v. Chadha, 103 S. Ct. 2764 (1983).^{10/}

Analysis

The Justice Department's analysis strains the plain meaning of the statute in attempting to make it appear improper. Congress has tried a clear and simple mechanism for dealing with the endemic problems of wasteful agency procurement violations. The Act provides for an automatic, nondiscretionary stay of a contract award upon notification of a bid protest. Thus, the statute gives bid protesters, whose protests trigger the automatic stay -- not the Comptroller General, who makes no decision regarding a stay -- the power to invoke the statutory stay. In essence, based on years of investigations of improper procurement awards, Congress decided that it was better to let bid protesters stay allegedly illegal awards before they occurred so that the matter could be looked into immediately, than to leave it to agencies to give out awards and then, maybe, rectify illegalities later. Obviously, the judgment that such a mechanism should be implemented to get agency procurement onto the lawful track could be made rationally by the Committee on Government Operations, which has spent years studying the problems of the procurement system.

^{10/} The Department also assails the provision allowing the Comptroller General to assess costs to a bid protester of an illegal action as unconstitutional under Buckley v. Valeo, 424 U.S. 1 (1976).

In any event, it is the bid protester who invokes the statute staying the award, and the legislative veto cases, involving decisions by one House of Congress to veto agency decisions, have nothing to do with the matter. Rather than acknowledging that bid protests cause the stay, the Justice Department contends that the statute is a means for the GAO to put agencies "on permanent 'hold.'" This Justice Department analysis predated the 90-day limit placed on the Comptroller General in the statute as enacted, rendering the Justice Department letter obsolete. With the 90-day limit in place, the real authority to stay contract awards temporarily conferred by the statute lies with the bid protester, not the Comptroller General.^{11/}

^{11/} Of course, a provision giving such effect to a private bid protest involves no separation of powers problem since the bid protester is not another Branch of the government. See, e.g., Currin v. Wallace, 306 U.S. 1 (1939).

The conferees on the bill noted emphatically regarding deadline extensions, including extension of the 90-day limit, that they "regard such extensions as exceptional, however, and to be used in unique circumstances only." H.R. Rep. No. 861, 98th Cong., 2d Sess. 1435-36 (1984). If the Justice Department continued to adhere to its view of the statute as a means to make a "permanent 'hold'", that could only be regarded as hyperbole. For occasions in which the Comptroller General takes a longer period than 90 days notwithstanding the conference report language, he must cite "specific circumstances," which would be of importance in any concrete challenge to the statute. To take a likely example, if the Comptroller General's decision takes longer than 90 days only because the agency accused of illegality interposes delays before providing information, or organizes its procurement mechanism to defy swift analysis, then the responsibility for delay may lie with the agency, not the GAO.

The real thrust of the Department's argument is its ahistorical challenge to the very notion of an independent audit and account-settlement officer addressing contract matters -- a challenge plainly inconsistent with the Framers' own constitutional understanding. In its key argument, the Justice Department challenges the GAO's authority "to settle the accounts of the Government, 31 U.S.C. § 3702," contending that "there has been considerable discussion over the years questioning whether this settlement authority is properly lodged in a legislative body like GAO." DOJ Letter at 2 n.2. The Justice Department argument appears to be that "the Comptroller General is properly considered to be an officer of the Legislative Branch," DOJ Letter at 1, and thus cannot exercise the authority to settle accounts which gave rise to his contract role.

Of course, the Justice Department makes no reference whatsoever to the history of the comptroller function in the government, for that history squarely refutes the Department's views.^{12/} The First Congress -- the Congress with unparalleled

^{12/} The Department's vague assertion that "there has been considerable discussion over the years," with the implication that many believe the Comptroller General's authority to settle accounts to be unconstitutional, appears to be an attempt by the Department to manufacture a historical record in its favor where there has been none. Not one source is cited on this point by the Department. Elsewhere, the Department cites the classic study of the GAO by the eminent W. F. Willoughby, Director of the Institute for Government Research and one of the founders of modern public policy studies. W.F. Willoughby, The Legal Status and Functions of the General Accounting Office of the National Government (1927), cited in DOJ Letter at 1 n.1. However, the (footnote continued)

understanding of the Constitution, based among other factors on its numbering as Members many of the Framers themselves^{13/} -- specifically addressed the need for independent judgment in resolution of the government's accounts, much like any operation must have an independent auditor. By statute, the First Congress established the office of Comptroller of the Treasury, "the great grandparent of the modern Comptroller General,"^{14/} with the duty to superintend the accounts of the government. James Madison, one of the authors of the Federalist Papers, and the Representative who had successfully led the crucial debate that kept Cabinet officers subject to presidential removal, argued that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government."^{15/}

Department did not wish to cite that key authority on this point, for good reason. Regarding the position that the law establishing the GAO as the agency that would settle accounts was unconstitutional, Willoughby comments disparagingly: "the position [may] be taken that Congress was without constitutional authority to create any such agency. Though this position may be taken, it is hard to see how it can be maintained." *Id.* at 14. The reasons set forth by Willoughby are those confirmed by the unanimous Supreme Court decision in Humphrey's Executor v. United States, 295 U.S. 602 (1935).

^{13/} See Myers v. United States, 272 U.S. 52 (1926).

^{14/} F. Mosher, The GAO: The Quest for Accountability in American Government 25 (1979).

^{15/} 2 Annals of Cong. 612 (1789), noted with approval, Humphrey's Executor v. United States, 295 U.S. 602, 631 (1935).

Madison's sound judgment ultimately prevailed in the evolution of the Comptroller General's role. In 1795, Congress made the Comptroller of the Treasury's judgments "final and conclusive," Act of March 3, 1795, ch. 48, § 4, 1 Stat. 441, 442, to put the Comptroller's functions outside of political will.^{16/} By 1809, the Comptroller's "independence of status ... seemed clearly indicated."^{17/} In 1838, the Supreme Court confirmed the validity of investiture of officers with independent responsibilities: "in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President." Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838).^{18/} Ultimately, the Budget and Accounting Act of 1921 implemented the historically-based necessity for independent supervision of the accounts, by vesting the account-settlement function in the Comptroller General who was not subject to Presidential removal.

^{16/} It may be fairly conjectured that Congress learned a great deal about improper government procurement, and thus began to understand the necessity for independent auditing judgment, from its very first investigation. That investigation concerned a military disaster largely brought on by faulty procurement. See Chalou, St. Clair's Defeat, 1792, in Congress Investigates: 1792-1794 1-18 (A. Schlesinger & R. Bruns eds. 1975).

^{17/} D. Smith, The General Accounting Office: Its History, Activities and Organization 22 (1927).

^{18/} For further discussion of the firm historic grounding of such independent officers, see Tiefer, The Constitutionality of Independent Officers as Checks on Abuses of Executive Power, 63 B.U.L. Rev. 59 (1983).

The constitutional power of the Congress so to provide was confirmed in Humphrey's Executor v. United States, 295 U.S. 602 (1935), the fundamental authority on this subject, which cited directly to Madison's original observation about the Comptroller, 295 U.S. at 631. Conveniently, in citing Buckley v. Valeo, supra, the Justice Department avoids mentioning that the Supreme Court expressly reconfirmed its Humphrey's Executor holding. "[T]he President may not insist that such functions be delegated to an appointee of his removable at will, Humphrey's Executor v. United States, 295 U.S. 602 (1935)." Buckley v. Valeo, supra, 424 U.S. at 141 (emphasis supplied).^{19/} Also conveniently, the Justice Department avoids mentioning that the Court expressly distinguished between true officers of the House or Senate, who are chosen by their House, and "the Comptroller General [who] is appointed by the President in conformity with the Appointments Clause." Buckley v. Valeo, 424 U.S. at 128 n.165. The Comptroller General can hardly be equated with a legislative veto which could be voted at will by Congress, when he is neither appointed by the Congress, nor subject to removal by it (absent enactment of a joint resolution); there is nothing in Chadha v. INS, supra, regarding legislative vetoes, which undermines the validity of independent officers reconfirmed in Buckley v. Valeo.

^{19/} The Justice Department's contention that in contract inquiries directly related to his auditing function, the Comptroller General cannot award costs, something that could be done by any of the independent agencies validated by Humphrey's Executor, is without merit.

Conclusion

Not a shred of historical support has been assembled by the Justice Department for challenging the account-settlement function from which the Comptroller General's contract functions arise. By fundamental American tradition started, and amply justified, by the Framers themselves, the Congress's sound approach to limiting government waste and fraud has been to stand an independent officer over the government's accounts and contracts. Buckley v. Valeo, supra, expressly validates that tradition, by confirming the validity of an officer appointed by the President but not subject to his removal for the performance of independent functions. The Competition in Contracting Act of 1984 is well within that tradition, particularly considering that the Comptroller General, an independent officer who can be vested with non-legislative functions, is only empowered to make "recommendations" and that the statute's automatic stay feature vests the real authority to stay awards in the bid protester, not the Comptroller General. This statutory response to endemic procurement problems passes constitutional muster.

17. August 8, 1984.--Memorandum from the American Law Division, Library of Congress, to the Oversight and Management Subcommittee, Senate Committee on Governmental Affairs, regarding constitutionality of the Competition in Contracting Act provisions.



Congressional Research Service
The Library of Congress

Washington, D.C. 20540

August 8, 1984

TO : Senate Committee on Governmental Affairs:
 Subcommittee on Oversight and Management
 Attn: Jeffrey A. Minsky

FROM : American Law Division

SUBJECT: Constitutionality of Providing a Statutory Base for General
 Accounting Office Bid Protest System

Reference is made to your recent inquiry requesting our comments on certain features of the Procurement Protest System established by Subtitle D, Deficit Reduction Act of 1984, P.L. 98-369.

In order "to insure that the mandate for ['full and open'] competition is enforced and that vendors wrongfully excluded from competing for government contracts receive equitable relief", Subtitle D of P.L. 98-368 codifies and strengthens "the bid protest function currently in operation at the General Accounting Office (GAO)." H. (Conference) Rept. 98-861, p. 1435 (1984).) Up to the present time, GAO has been deciding executive branch contract award protests on the basis of its authority to determine the legality of public expenditures. 31 U.S.C. § 3526. See United States v. Stewart, 234 F. Supp. 94, 99 (D. C.C. 1964), affd. 339 F. 2d 753 (D.C. Cir. 1964). The formalized bid protest procedures of the new law, codified at sections 3551-3556 of Title 31, United States Code, become effective with respect to any protest filed after January 14, 1985.

The procedures authorized by the law are set in motion by submission of a protest by an interested party (§ 3553(a)) who alleges that a contract or proposed contract award fails to comply with procurement law or regulations (§ 3552). An interested party is any actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract for the procurement of property or services (§ 3551).

When a protest is filed with GAO, the Comptroller General (CG) must notify the executive agency involved within one working day of receipt of the protest (§ 3553(b)(1)). The executive agency is given 25 working days to respond to the protest (§ 3553 (b)(2)(A)); 10 days are allowed for a response if the CG selects the express option procedures authorized by § 3554 (a)(2) that apply when a protest is susceptible of earlier resolution (§3553 (b)(2)(C)).

The CG has 90 working days from receipt of the protest (§ 3554(a)(1)) or 45 calendar days under the express option (§ 3554(a)(2)) to declare whether the award or proposed award of a contract complies with procurement law or regulations (§§ 3552 and 3553). Generally, a contract challenged on these grounds cannot be awarded pending a decision by the CG (§ 3553(c)(1)). Moreover, if a protest is filed within 10 days after the award of the contract, performance on that contract must cease and all related activities that may result in additional obligations being incurred by the United States must be suspended pending a decision by the CG (§ 3553(d)(1)). However, the executive agency involved may go ahead and make the award or continue to perform on an awarded contract when it determines and notifies the CG that compelling circumstances which significantly affect interests of the United States require it (§ 3553(c)(2)). This go ahead authority, however, is available only if the award of the contract is likely to occur within 30 calendar days (§ 3553(c)(3),(d)(2)).

If the CG determines that the solicitation, proposed award or award does not comply with procurement law or regulations, he is required to recommend corrective action to the agency that promotes compliance with legal requirements (§ 3554(b)(1)). The CG additionally may recommend monetary awards and costs, including reasonable attorneys' fees (§ 3554(c)).

The authority granted the CG to decide bid protests is not exclusive. Accordingly, an interested party retains the ability to pursue other administrative or judicial relief for any violation of a procurement law or regulations (§ 3556).

As previously indicated, the law largely formalizes functions presently being performed by GAO in connection with the award of executive branch contracts. Specific authority to recommend attorneys' fees is among the few departures from current practice made by the law.

In brief, when a protest is filed, the CG has to decide whether awards or proposed awards comply with law or regulations, and recommend appropriate relief. For the most part, the law, not the CG, holds up a proposed award or suspends in certain circumstances further performance on an award previously made to enable the CG to decide the issue. Some limited discretion is granted the CG to extend the time which an agency has to respond to a protest (§ 3553(a)(2)(B)) and which he has to decide the merits of the protest (§3554(a)(1)). The conference report indicates that the latter authority is to be used sparingly and "in unique circumstances only." H. Rept. 98-861 at 1436.

Constitutional objections have been lodged against the law. At the time of signing the Deficit Reduction Act of 1984, President Reagan charged that the bid protest provisions appear to violate the Constitution's separation of powers doctrine by giving GAO a formal role in the awarding of executive

branch contracts. The President's view in this matter reflects the position previously taken by the Department of Justice regarding similar legislation. See April 20, 1984, letter to Representative Jack Brooks, Chairman, Committee on Government Operations, House of Representatives.

Generally speaking, the Department takes the position that the law gives to a legislative officer, i.e., the CG, executive or judicial authority contrary to the doctrine of separation of powers. The Department relies chiefly on Buckley v. Valeo, 424 U.S. 1, 139 (1976) in support of this conclusion and invokes INS v. Chadha, 103 S. Ct. 2764 (1983) to assert that Congress and, therefore, the CG as a legislative officer, may not stay the award or performance of a contract pending review by a legislative official.

These constitutional conclusions are based on the assumption that the CG is a purely legislative officer. That assumption is crucial to the Department's constitutional objections stated in the aforementioned April 20, letter to Chairman Jack Brooks.

The Department's April 20 letter, additionally, necessarily assumes that the bid protest functions formally adopted by the law are essentially executive or judicial rather than legislative in nature. If these assumptions are correct, the law's provisions applicable to bid protests would raise the constitutional issues described by the department. That "the legislature cannot engraft executive duties on a [purely] legislative office" consistent with the separation of powers doctrine is virtually beyond question. Springer v. Philippine Islands, 217 U.S. 189, 202 (1908). Similarly, it is fundamental that the authority to administer and enforce the public laws is an executive function which can only be enforced by "Officers of the United States". Buckley v. Valeo, 424 U.S. at 139-141.

The congressional power to allocate responsibilities for the execution of laws is a broad power. "To Congress under its legislative power is given

the establishment of offices, the determination of their jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are appointed and their compensation ..." Myers v. United States, 272 U.S. 52, 129 (1926); Buckley v. Valeo, 424 U.S. 1, 134 (1976). Also, Congress may devolve upon an executive official already in office additional duties which are germane to that office. Shoemaker v. United States, 147 U.S. 282, 301 (1893).

In light of the acknowledged power of Congress to establish offices and to reasonably regulate many incidents relating to offices within constraints flowing from the separation of powers doctrine, the propriety of the role given to GAO in awarding government contracts by the law turns on the resolution of two matters: first, the status of the CG as either an executive or legislative officer; second, the nature of the functions to be carried out by the GAO.

Clearly, if the CG is a purely legislative officer, the grant of executive functions to him would pose separation of powers problems. However, if his functions relating to bid protests are such that Congress itself could have discharged them, Congress can delegate similar functions to a subordinate legislative unit, and "there can be no question that the [CG as a legislative officer] may execute them." Buckley v. Valeo, 424 U.S. at 137. Conversely, if the CG is an "Officer of the United States," the confiding of the functions in question on him would not violate the doctrine of separation of powers.

Although the answer to both these issues is not so conclusive as to be preclusive of contrary argument, evidence supporting the view that the CG is an "Officer of the United States" and that the bid protest functions formalized by the law are executive functions which he can discharge, commands more respect.

Turning to the latter first, it should be noted that but for the curious fashion in which the law for the most part formalizes GAO's current bid protest activities, they would clearly constitute executive functions. In the main, these involve administration and enforcement of procurement law "to ensure that ... ['full and open'] competition is enforced and that vendors wrongfully excluded ... from government contracts receive equitable relief." H. Rept. No. 98-861 at 1435. (Emphasis added). These functions (i.e., deciding whether an award or prospective award complies with law and regulations, recommending administrative and other relief, including costs and attorneys' fees, issuing regulations, and extending response time and decision-making time) which are to be "exercised free from day-to-day supervision of either Congress or the Executive Branch ... are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress... These administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'" Buckley v. Valeo, 424 U.S. at 140-141.

Although the bid protests functions formalized by the law in our view entail essentially executive activities, the law is written in terms that seemingly make the CG an information gatherer and a reviewing and advisory official whose resolution of a bid controversy, while entitled to respect, is for the most part free of compulsion. He is authorized to decide the issue of an actual or prospective award's conformance with law or regulations, but

he only recommends remedial relief. The latter's actual implementation is left to the contracting executive agency involved. Moreover, the latter, as indicated, can override the CG in appropriate circumstances. For the most part, the award of a contract or performance under a contract is suspended for fixed periods by the operation of law, not by action of the CG. See INS v. Chadha, 103 S. Ct. at 2786, note 19, re the validity of durational limits on authorizations. Finally, the CG's role is expressly made nonexclusive so that existing administrative and judicial avenues of remedial relief remain available to an interested party.

Viewed in this narrow, and in our view, artificial light, the activities to be carried out by the CG under the law could be carried out by Congress itself. "Insofar as the powers confided ... are essentially of an investigative and informative nature, falling in the same general category as the powers which Congress might delegate to one of its own committees, there can be no question that...[a legislative officer] may exercise them." Buckley v. Valeo, 424 U.S. at 137. In other words, Congress could informally give its opinion regarding compliance vel non with law or regulations of a contract award and recommend appropriate relief when there has been a failure of compliance with legal requirements. An informal procedure along this line that is devoid of any compulsory effect seems to raise no separation of powers problems. See City of Alexandria v. United States, Appeal No. 84-713 (June 21, 1984). Accordingly, Congress might delegate their exercise to the CG.

However, it would blink at reality to conclude that the CG's functions in this regard are solely of an investigative and informative nature and that his influence on contracting executive agencies is limited to moral suasion. Cf. City of Alexandria v. United States, *supra*. In enacting the bid protest procedures, the conferees stated that they "believe[d] that strong enforcement is necessary to insure that the mandate for competition is enforced ..." H. Rept. 98-861 at 1435. (Emphasis added) Clearly, Congress did not intend that the CG decide whether awards or proposed awards comply with law or regulations and recommend appropriate administrative relief, including granting attorneys' fees, as an academic or training exercise. Although suspension of an award or performance of a contract pending a GAO decision flows largely by operation of law in the vast majority of cases and can be overridden by the contracting executive agency in appropriate cases, the CG's resolution and recommendations were obviously intended to weigh heavily on agency action. In the words of Judge Holtzoff directly on point: "As a practical matter, no disbursing officer would make any...payments in the face of... [the CG's contrary] ruling." United States v. Stewart, 234 F. Supp. at 98.

These speculative matters aside, however, the law in a number of particulars gives the GAO the kind of administrative discretion that is usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Thus, while at the time that an agency has to respond to a bid protest that is triggered by the filing of a protest by an interested party is generally fixed by the law at 25 working days (10 working days under the express option), the CG has discretion to determine a longer period (§ 3553(b)(2)(C)). Similarly, while

an award or performance under a contract generally is to be suspended by law for a fixed period of 90 days, the CG is authorized to extend the period if he determines "that the specific circumstances of the protest require a longer period" (3554(a)(1)). The decision in INS v. Chadha, 103 S. Ct. at 2786 clearly signals that congressional actions at odds with the exercise of statutorily delegated authority to an agency have to take the form of law: "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." If Congress is disabled from mandating an extension of time informally and thus preventing the exercise of authority delegated to an agency, a similar result obtains with respect to the CG if he is deemed to be a purely legislative officer. As such, he would stand in no better position than Congress.

Other features of the new law suggest that something more than moral suasion is involved. For example, monetary awards, "including reasonable attorneys' fees," that the CG may recommend "shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and service" (§ 3554(c)(92)). A federal agency which fails to fully implement the CG's recommendations within 60 days has to report it to him and he, in turn, is to include it in an annual report to Congress (§ 3554(e)). The exaction of fees and awards are typically functions exercised by agencies and courts.

Notwithstanding that the law generally relies on the agencies to enforce its provisions under GAO's direction, it does not seem unfair to state that it is instinct with obligation and compulsion imperfectly expressed. However, there is no need to speculate upon these matters since it has been judicially determined that the CG is performing executive functions in "approv[ing] or disapprov[ing]...payments made by Government departments and other agencies, as well as ...[in] settling and adjusting accounts in which the Government is concerned..."United States v. Stewart, 234 F. Supp. at 99. As executive functions they could not be exercised by the CG if he were a purely legislative officer.

The Department of Justice rests its assumption that CG is a legislative official and, therefore, ineligible to discharge executive functions on the statute establishing the GAO as an independent instrumentality and widespread perceptions of the CG as an officer of the Legislative Branch.

Although the department describes the agency's enabling statute, 31 U.S.C. § 702(a), as making the GAO an "instrumentality 'independent of the executive branch'", the law reads "independent of the executive departments."

The law on its face, therefore, gives GAO independence vis-a-vis the executive departments, not in express terms from the Executive Branch. At odds with the assertion that he is independent of the Executive Branch are the requirements that the CG report "to the President when requested by the President on the work of the ... [GAO]," 31 U.S.C. § 719(a), and to "give the President information on expenditures and accounting the President requests" (31 U.S.C. § 719(f)).

Because the GAO which he heads is generally regarded as a congressional support agency, the CG is widely perceived on Capitol Hill as "their man". See, e.g., C.Q. Guide to Congress (2d ed.) 485 (1976). However, neither the statutory nor congressional designations preclude the courts from looking behind them and making determinations on the basis of functional activities and other factors. See, e.g., Glidden Company v. Zdanok, 370 U.S. 530, 552 (1962): "... whether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article ..." Likewise, the nature and status of an officer is not controlled by a statutory labels expressed or implied, but by the nature of the functions to be performed by the officer and the manner of his or her appointment. Buckley v. Valeo, 424 U.S. at 138-139.

Notwithstanding congressional and other assumptions regarding the CG, both the mode of his appointment and the nature of some of his duties make him an "Officer of the United States." He is appointed by the President with the advice and consent of the Senate for a term of 15 years. 31 U.S.C. § 703(a)(1) and (d). That the CG is an "Officer of the United States" is confirmed in Buckley v. Valeo, where the Supreme Court struck down the

Federal Election Commission (FEC), none of whose members were appointed in conformity with Art. II, § 2, cl. 2. Finding that FEC performed significant enforcement authority pursuant to law, principally discretionary power to seek judicial relief, the Court held that such authority could be exercised only by persons who are appointed in conformity with the Constitution's Appointments Clause. In response to Commission's attempts to analogize itself with the CG, the Court observed as follows:

Appellee Commission has relied for analogous support on the existence of the Comptroller General, who as a "legislative officer" has significant duties under the 1971 Act. § 308, 86 Stat. 16. But irrespective of Congress' designation, cf. 31 U.S.C. § 65(d), the Comptroller General is appointed by the President in conformity with the Appointments Clause. 424 U.S. 128, note 165. (Emphasis added)

Briefly, the CG as an "Officer of the United States" is capable of exercising administrative and enforcement functions which neither Congress itself nor purely legislative officers can perform consistent with separation of powers principles.

As previously noted, the exercise by the CG of executive as well as legislative functions was recognized in United States v. Stewart, 234 F. Supp. at 99-100. Noting his effective involvement in bid protest matters as an aspect of his statutory authority to settle public accounts and contrasting it with his auditing functions, the court observed as follows:

The Comptroller General is the head of the General Accounting Office, 31 U.S.C. § 41. Unlike heads of most departments and establishments of the Government, he occupies a dual position and performs a two-fold function. First, he makes investigations of matters relating to the receipt, disbursement and application of public funds, and reports the results of his scrutiny to the Congress with appropriate recommendations. In addition he pursues investigations that may be ordered by either House of Congress, or by any Committee of either House, in matters relating to revenue, appropriations or expenditures, 31 U.S.C. § 53. In performing these functions the status of the Comptroller General is that of an officer of the legislative

branch of the Government. The Congress has comprehensive authority to undertake investigations in aid of legislation, or in connection with the appropriation of funds. Investigations are an aid to legislation and to the making of appropriations and are therefore auxiliary to the basic functions of the Congress. The Congress may conduct investigations either through Committees or through an official such as the Comptroller General.

The Comptroller General has also a second status as the chief accounting officer of the Government. His second principal function is that of approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned, 31 U.S.C. § 71. This is an executive function and in performing it the Comptroller General acts as a member of the Executive branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive duties, Humphrey's Executor v. United States, 295 U.S. 602 55 S. Ct. 869, 79 L. Ed. 1611. Cf, Myers v. United States, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160.

In more recent times, Congress has grafted other executive functions on the CG, conspicuously the power to seek judicial relief. The Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 686-687, authorizes the CG to monitor executive spending actions and to bring a civil action in the federal courts to require budget authority to be made available for obligation. Similarly, the General Accounting Office Act of 1980, 31 U.S.C. § 716(b), empowers the CG to bring a civil action to require the production of certain agency records. As stated by the Supreme Court in Buckley v. Valeo, 424 U.S. at 140: "... responsibility for conducting civil litigation in the courts of the United States for vindicating public rights ... may be discharged only by persons who are 'Officers of the United States'".

Notwithstanding that the CG is appointed in the manner constitutionally prescribed for the appointment of "Officers of the United States" and

that he discharges unquestionably executive functions, it is sometimes contended that since he is not removable at the will of the President, he is a legislative officer. Initially, it may be noted that legislative qualifications on removal in the form of requiring removal for cause do not convert an officer into a purely legislative officer. See Buckley v. Valeo, 424 U.S. at 135 et seq. where the Court discusses the "trilogy of cases" dealing with the constitutional authority of Congress to circumscribe the President's power to remove officers of the United States. Although qualifications of this kind may not be imposed on purely executive officers, they are permissible in the case of officers who additionally exercise functions which are legislative or judicial in nature. As the CG exercises both legislative and executive functions, United States v. Stewart, 234 F. Supp. at 99-100, the constitutional authority of Congress to circumscribe the President's power to remove him is consistent with the Court's removal jurisprudence.

Under existing law, 31 U.S.C. § 703(e)(1), the CG "may be" removed by impeachment or by joint resolution for specified reasons including permanent disability, inefficiency, neglect of duty, malfeasance, or a felony or conduct involving moral turpitude. While the law provides that he "may be" removed by impeachment or by law (i.e., a joint resolution), the law on its face does not preclude removal by the President. Compare and contrast "may be" and "shall only be".

Despite some question regarding the propriety of removal by law for the enumerated reasons — a matter which need not concern us now — the

alternative means of effecting the CG's removal are instructive. Clearly, if the CG were a purely legislative officer, Congress could remove him without recourse to law or the impeachment process. In providing for removal by a joint resolution which has to be submitted to the President, Congress signaled its appreciation of the fact that the CG was something more than a legislative officer. This signal is reinforced by the alternative removal procedure, namely impeachment, which under Art. II, § 4 is available only in the case of the President, the Vice President and all civil officers. Although the availability of impeachment to remove legislative officers who are neither Senators or Representatives is problematical, the Senate in the impeachment trial of Senator William Blount in 1797 effectively ruled that members of Congress cannot be impeached. 3 Hinds' Precedents of the House of Representatives § 2294 et seq. (1907) In brief, the statutory removal provisions applicable to the CG do not derogate from his being an "Officer of the United States" for certain purposes, but are consistent therewith.

In summary, notwithstanding GAO's independence vis-a-vis the executive departments and widespread misconceptions regarding the CG's status, there are good and compelling reasons for concluding that he is an "Officer of the United States" and as such has the capacity to discharge the executive functions of resolving bid protests as formalized by Subtitle D of the Deficit Reduction Act of 1984.

Raymond J. Celada
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Senior Specialist In
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August 8, 1984

18. August 1, 1984.--Memorandum from Morgan F. Frankel, Assistant Counsel, Office of Senate Legal Counsel, to Senate Governmental Affairs Committee, regarding "Constitutionality of Procurement Statute."

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10- Sum. Review
2017-10-10

MEMORANDUM

To: Link Hoewing
From: Morgan J. Frankel *M.F.*
Date: August 1, 1984
Re: Constitutionality of Procurement Statute

Introduction

You have requested our views concerning the opinion of the Department of Justice that provisions of Title VII of the Deficit Reduction Act of 1984 ("the Act") establishing a statutory basis for the bid protest system administered by the Comptroller General are unconstitutional. The Department raised two principal separation-of-powers objections to the enactment of an earlier version of the Act, H.R. 5184. First, it asserted that the bill's vesting of judicial or executive powers in the Comptroller General violates the Appointments Clause of the Constitution and Buckley v. Valeo, 424 U.S. 1 (1976). Second, it contended that the bill violates the prohibition of Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), against legislative action by the legislative branch without action by both Houses and presentation to the President. We disagree with the Department's conclusions and believe that Title VII is consistent with the doctrine of separation of powers as illuminated by the Supreme Court.

The Statutory Scheme

The Department's objections are directed at two provisions of the Act.^{1/} First, section 2741(a) establishes a statutory procedure for interested parties to file protests with the Comptroller General alleging violations of government procurement requirements. Under the statutory scheme, the initiation of a bid protest with the Comptroller General automatically stays the authority of the procuring agency to award a contract. The purpose of the stay is to enable the Comptroller General expeditiously to consider the protest and the agency's response, and to preclude the intervening award of a contract from altering the circumstances of his decision. To that end, the statute prohibits the award of a contract in a procurement subject to a pending protest, unless the procuring agency has advised the Comptroller General that "urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller

^{1/} While the legislation was pending in the Congress, the Department also objected to a provision of H.R. 5184 that would have authorized courts to refer bid disputes to the Comptroller General. This provision is not contained in the Act. Instead the conference report states, "The Comptroller General currently receives from courts and agencies requests concerning the propriety of procurements. The conferees intend that the Comptroller General have the discretion to continue to process these requests in a manner consistent with the one used for bid protests." 130 Cong. Rec. H6760 (daily ed. June 22, 1984).

General." (To be codified at 31 U.S.C. § 3553(c).) The Act provides the Comptroller General with discretion to establish a period of forty-five days, ninety days, or a longer period if necessary, to complete his review of the protest or to dismiss a protest as frivolous at any time. (To be codified at 31 U.S.C. § 3554(a).)

If the Comptroller General determines that a protested procurement does not comply with a statute or regulation, he may recommend that the agency take actions, such as recommending the contract or issuing a new solicitation, to promote compliance with its procurement obligations. (To be codified at 31 U.S.C. § 3554(b).) To complete this purely recommendatory scheme, procuring agencies must report to the Comptroller General if they have not fully implemented the Comptroller General's recommendations, and the Comptroller General must annually report to Congress on agencies' failures to implement his recommendations. (To be codified at 31 U.S.C. § 3554(e).)

Second, section 2741(a) of the Act authorizes the Comptroller General to award to a successful protesting party his costs, including attorneys' fees, of pursuing the protest and of bidding on the procurement. (To be codified at 31 U.S.C. § 3554(c).) The statute provides that such monetary awards "shall be paid promptly by the Federal agency concerned." (To be codified at 31 U.S.C. § 3554(c).)

The Department of Justice's Objections

The Justice Department asserts that the statutory bid protest system violates Chadha because it "delegates to an entity such as GAO the power effectively to block Executive action outside the legislative process." Letter of Assistant Attorney General Robert A. McConnell to Representative Jack Brooks, Apr. 20, 1984, at 3. The Department analogizes the role of the Comptroller General in the protest process to that of a congressional committee in a "committee approval" provision, "the only difference being that the GAO would play the pivotal role." Id. This argument is grounded upon the Department's view that the Comptroller General is a legislative entity: "The GAO is an instrumentality 'independent of the executive branch,' 31 U.S.C. § 702(a), and the Comptroller General is properly considered to be an officer of the Legislative Branch." Id. at 1.

The Status of the Comptroller General
as an Officer of the United States

The Department's separation of powers objections to the statute's vesting of authority in the Comptroller General fail because the Department misconprehends the status of the Comptroller General. Although for some purposes he may be considered a legislative official,

[t]he Comptroller General has also a second status as the chief accounting officer of the Government. ... This is an executive function and in performing it the Comptroller General acts as a member of the

Executive Branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive duties,...

United States v. Stewart, 264 F.Supp. 89, 99 (D.D.C.), aff'd, 339 F.2d 753 (D.C. Cir. 1964) (emphasis supplied). The fact that the General Accounting Office is statutorily "independent of the executive departments," 31 U.S.C. § 702(a), no more renders it a legislative entity than the independence of the Federal Trade Commission renders it a congressional body. The Supreme Court has long recognized the legitimacy of agencies, like the Federal Trade Commission, that perform a combination of quasi-judicial, quasi-legislative, or quasi-executive functions and that, though composed of presidential appointees, operate free from executive control. See Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935) (the Federal Trade Commission is "a body which shall be independent of executive authority, except in its selection").

Rather than focusing on the hybrid functions of such an entity, for separation of powers purposes the Supreme Court looks to its mode of selection. In Buckley v. Valeo, 424 U.S. 1, 133 (1975) (per curiam) (quoting Humphrey's Executor), the Court held that the Appointments Clause of the

Constitution^{2/} "controls the appointment of the members of a typical administrative agency even though its functions ... may be 'predominantly quasi-judicial and quasi-legislative' rather than executive." Congress had given the Federal Election Commission, whose membership then included individuals appointed by Members of Congress, "extensive rulemaking and adjudicative powers." Id. at 110. The Court concluded that the composition and duties of the Commission violated the Appointments Clause: "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of" article two of the Constitution. Id. at 126.

The Comptroller General is "appointed by the President, by and with the advice and consent of the Senate." 31

2/ [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Offices of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, Sec. 2, Cl. 2 (emphasis supplied).

U.S.C. § 703(a)(1).^{3/} Accordingly, under Buckley he properly exercises authority as an officer of the United States.^{4/} Because of the Comptroller General's status as an officer of the United States, the Department's invocation of Chadha is

3/ The Comptroller General's status as an officer of the United States is not affected by the existence of statutory restrictions on his removal. 31 U.S.C. § 703(e)(1). Although these limitations have never been tested, see, e.g., Myers v. United States, 272 U.S. 52 (1926); Humphrey's Executor, supra, under the Constitution it is solely the mode of appointment that determines whether an official is "an officer of the United States."

4/ In fact, the Supreme Court explicitly recognized the propriety of the Comptroller General's status in Buckley. In that case the Federal Election Commission had attempted to analogize its role to that of the Comptroller General. The Court pointed out the weakness of the analogy: "[I]rrespective of Congress' designation ... [of the Comptroller General as a legislative officer,] the Comptroller General is appointed by the President in conformity with the Appointments Clause." Buckley, supra, 424 U.S. at 128 n.165.

Moreover, the Justice Department has previously acknowledged the Comptroller General's status as an officer of the United States. The plaintiff in The Boeing Co. v. United States, 680 F.2d 132 (Ct.Cl. 1982), cert. denied, 103 S.Ct. 1768 (1983), raised, among many issues, a challenge to the constitutionality under Buckley of the appointment of members to a former governmental entity known as the Cost Accounting Standards Board, which was comprised of the Comptroller General and four individuals appointed by him. Construing the Board's functions as advisory, the Department viewed it as a legislative entity. However, the Department agreed with the plaintiff that, irrespective of the characterization, although the appointment of the four other members of the Board might be troublesome under Buckley, the participation on the Board of the Comptroller General, an officer of the United States appointed by the President, raised no constitutional problems. See Letter of Deputy Assistant Attorney General Stuart E. Schiffer to Senate Legal Counsel Michael Davidson, Nov. 25, 1980, at 4 ("Comptroller General passes muster" under Appointments Clause). The court did not reach the constitutional issue.

inapposite. Consistent with the Court's decisions in Buckley and Chadha, the Congress has a choice: it may create purely legislative entities and appoint purely legislative officials to administer them, in which case any authority the officials exercise outside the legislative branch must meet the constitutional requirements of bicameralism and presentation to the President. Alternatively, the Congress may establish governmental entities to exercise delegated authority, in which case the officials in those entities may be appointed only by the President, the courts, or the heads of departments. Here, the Congress has properly chosen to delegate authority to an officer appointed by the President.^{5/}

This understanding of the role of the Comptroller General as an officer of the United States coheres with the functions previously assigned to the Comptroller General by statute. The Comptroller General has sweeping statutory authority to audit accounts and expenditures of agencies of the United States Government. 31 U.S.C. §§ 3522-3525. The Comptroller General also has statutory authority to settle all accounts of the Government, to settle claims of or against the Government, and to supervise the recovery of

^{5/} The fact that the Comptroller General also performs statutory reporting and investigatory duties in aid of Congress, see, e.g., 31 U.S.C. §§ 712, 717-719, does not alter his status as an officer of the United States. The Supreme Court recognized in Humphrey's Executor that the Federal Trade Commission performs both types of statutory duties. 295 U.S. at 628.

debts due the Government. 31 U.S.C. §§ 3526-31, 3702. Moreover, decisions of the Comptroller General are binding upon agencies of the Executive Branch. See United States ex rel. Skinner & Eddy Corp. v. McCarl, -275 U.S. 1, 4 n.2 (1927).

The suggestion by the Executive Branch that the delegation of authority to the Comptroller General in the Deficit Reduction Act contravenes the separation of powers brings into question the broad responsibilities that the Congress has delegated to the Comptroller General over time. The Justice Department here maintains that the statutory role of the Comptroller General in the bid protest system constitutes an unconstitutional authority "to block Executive action outside the legislative process." McConnell Letter, supra, at 3. Further, the Department objects specifically to the Comptroller General's authority to award legal costs against procuring agencies:

Whether this authority is analyzed as GAO's performing a judicial function which is binding on an executive agency, or as GAO's rendering an administrative decision for the Executive Branch, it is clearly unconstitutional. The doctrine of separation of powers does not ... permit the Legislative Branch to execute the law by determining how contracts should be awarded or to adjudicate claims against the Executive Branch.

Id. (citation omitted). There is no language in Buckley or Chadha to support such an attack on the important role of the Comptroller General in assuring the sound and lawful administration of the Government's finances.

Conclusion

In sum, nothing in the Supreme Court's decisions in Buckley or Chadha nor in the doctrine of separation of powers appears to forbid the Comptroller General's role in the bid protest system contained in Title VII of the Deficit Reduction Act of 1984, because the Comptroller General is an officer of the United States, appointed by the President and confirmed by the Senate. The fact that the Comptroller General also performs numerous distinct functions at the direction of Congress, in aid of the legislative function, does nothing to alter this conclusion.

19. August 1, 1984.--Joint letter from the House Committee on Government Operations and Senate Committee on Governmental Affairs to Comptroller General Charles A. Bowsher requesting the establishment of an inter-divisional task force to review implementation of the Competition in Contracting Act.

Congress of the United States

Washington, D.C. 20515

August 1, 1984

The Honorable Charles A. Bowsher
Comptroller General of the United States
Washington, D.C. 20548

Dear Mr. Bowsher:

As you know, the Competition in Contracting Act was recently enacted into law as part of the Deficit Reduction Act of 1984. We want to thank you and your staff for the strong support and assistance provided during the consideration of this important government-wide procurement reform legislation.

Our work is not done, however, as we must ensure that (1) the amendments to the Federal Acquisition Regulation required to implement this Act accurately reflect congressional intent; (2) implementation is carried out in a timely fashion, allowing for a public comment period, in order to meet the April 1, 1985 deadline; and (3) the procuring agencies comply with the statutory and regulatory requirements of the Act.

Accordingly, we request that you establish an inter-divisional task force to review the implementation of, and subsequent compliance with, the Competition in Contracting Act. We request that GAO report its findings, conclusions, and recommendations by March 1, 1985, to the Senate Governmental Affairs Subcommittee on Oversight of Government Management and the House Government Operations Committee.

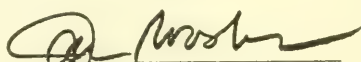
We also request that you report by December 15, 1984, on GAO's plans to implement the bid protest provisions contained in section 2713 and subtitle D of the Act, which take effect on January 15, 1985.

Again, thank you and your staff for your hard work and diligence toward increasing competition in Federal contracting. We greatly appreciate your efforts.

Sincerely,



WILLIAM S. COHEN, Chairman
Subcommittee on Oversight
of Government Management
Senate Committee on
Governmental Affairs



JACK BROOKS, Chairman
House Committee on
Government Operations

Carl Levin

CARL LEVIN
Ranking Minority Member

Frank Horton

FRANK HORTON
Ranking Minority Member

20. July 31, 1984.--Letter from Defense Acquisition Regulatory Council and Civilian Agency Acquisition Council to Rep. Frank Horton regarding establishment of Ad Hoc Interagency Task Group.



OFFICE OF THE UNDER SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

JUL 31 1984

RESEARCH AND
ENGINEERING
(AM)

Representative Frank Horton
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Horton:

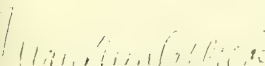
The Competition in Contracting Act of 1984 substantially changes the basic statutes underlying the Federal procurement system. Agencies will be required to achieve full and open competition by soliciting sealed bids or requesting competitive proposals, unless a statutory exception is met to use other than competitive procedures. Among its major provisions, the Act imposes new justification, approval, and notice requirements for contracts employing other than full and open competition; requires appointment of a competition advocate in each procuring activity; codifies the General Accounting Office bid protest process; and provides statutory authority for the General Services Board of Contract Appeals to resolve protests regarding ADP procurement.

The Defense Acquisition Regulatory Council and the Civilian Agency Acquisition Council have established a joint Ad Hoc Interagency Task Group to draft proposed coverage incorporating the new Competition in Contracting Act of 1984 into the Federal Acquisition Regulations system. The two Councils will jointly oversee the task group and will approve draft coverage by 30 September 1984.

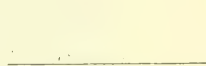
Industry will be asked to assist up front by providing comments on major issues regarding the implementation of the Act. Because of the stringent time constraints imposed by the legislation, public comments on the proposed FAR revisions will be requested on an expedited basis so that the Councils can utilize that input in developing final coverage by mid-October. Public comment will also be invited on the final rule.

The final coverage must be published in a Federal Acquisition Circular and the Federal Register by December 1984 so that orientation/training can be accomplished. FAR solicitations incorporating the Act will require at least three months lead time to achieve effective implementation by its 31 March 1985 statutory deadline.

Sincerely,


MARY ANN GILLEECE
Deputy Under Secretary
(Acquisition Management)


ALLAN W. BERES
Assistant Administrator
for Acquisition Policy
GSA


S. J. EVANS
Assistant Administrator
for Procurement
NASA

21. July 19, 1984.--Article by Myron Struck, "President Resists Wider GAO Role," Washington Post, p. A19.

President Resists Wider GAO Role

WASHINGTON POST, JULY 19, 1984, A19

Upholds the Executive Branch

By Myron Struck

Washington Post Staff Writer

When President Reagan signed the \$60 billion deficit-reduction bill yesterday, his only comment was a short statement criticizing a provision of the measure that will make it easier to challenge the awarding of federal contracts.

Citing Justice Department research, Reagan said he had to "vigorously object" because the law will let the General Accounting Office block executive branch agencies from awarding contracts if a "bid protest" has been filed.

"I am instructing the attorney general to inform all executive branch agencies . . . how they may comply with the provisions of this bill in a manner consistent with the Constitution," Reagan said.

For 63 years the GAO, an arm of Congress, has reviewed bid protests, but agencies usually award contracts before it has a chance to issue an opinion on whether a contract was awarded correctly.

Beginning Jan. 1, the new law will require agencies to hold up a contract that has been awarded if a legitimate protest has been filed with the GAO. The GAO will continue to dismiss, without detailed studies, complaints that it deems "frivolous."

"Today, under the regulations, there is little consideration that an agency has to give to a bid protester, and they rarely issue stop-work orders even if gross infractions have turned up," said Seymour Efros, the GAO's associate general counsel for procurement.

Reagan, however, said the measure "would unconstitutionally attempt to delegate to the comptroller general of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch."

The comptroller general, who serves a single, 15-year term as head of the GAO, is selected by the president, subject to Senate confirmation. But he heads a legislative branch agency and cannot be removed by the president.

The GAO had sought the new provision and had worked with Rep. Jack Brooks (D-Tex.), chairman of the House Government Operations Committee, to draft a version that would be sensitive to concerns about the separation of powers.

Efros contended that "the new law does not give the GAO the power to order the federal agencies to hold up a procurement." Instead, he said, it requires the agencies to hold up a contract after GAO notifies them of a legitimate bid protest.

Efros said that, in most cases, the new law also will require agencies to file their views on a bid protest within 25 days, and will require a GAO decision within 90 days. Previously, there were no deadlines.

22. July 18, 1984.--Statement of the President on signing of Competition in Contracting Act, "Deficit Reduction Act of 1984," Weekly Compilation of Presidential Documents, Vol. 20, No. 28, p. 1037.

Deficit Reduction Act of 1984

*Statement on Signing H.R. 4170 Into Law
July 18, 1984*

I am today signing H.R. 4170. In signing this important legislation, I must vigorously object to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch. This administration's position on the unconstitutionality of these provisions was clearly articulated to Congress by the Department of Justice on April 20, 1984. I am instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply with the provisions of this bill in a manner consistent with the Constitution.

Note: As enacted, H.R. 4170 is Public Law 98-369, approved July 18.

23. July 18, 1984.--Portion of Public Law 98-369, Deficit Reduction Act of 1984, containing the Competition in Contracting Act, with related portion of June 23, 1984, conference report, Report 98-861, containing the statement of managers.

PUBLIC LAW 98-369—JULY 18, 1984

DEFICIT REDUCTION ACT OF 1984

(b) **EFFECTIVE DATE.**—The amendment made by this section shall apply to articles containing distilled spirits brought into the United States after September 30, 1985.

26 USC 7652
note.

TITLE VII—COMPETITION IN CONTRACTING

Competition in
Contracting Act
of 1984.

SHORT TITLE

SEC. 2701. This title may be cited as the "Competition in Contracting Act of 1984".

41 USC 251 note.

Subtitle A—Amendments to the Federal Property and Administrative Services Act of 1949

PROCUREMENT PROCEDURES

SEC. 2711. (a)(1) Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended to read as follows:

"COMPETITION REQUIREMENTS

"SEC. 303. (a)(1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services—

"(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

Post, p. 1203.

"(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

"(2) In determining the competitive procedures appropriate under the circumstance, an executive agency—

"(A) shall solicit sealed bids if—

"(i) time permits the solicitation, submission, and evaluation of sealed bids;

"(ii) the award will be made on the basis of price and other price-related factors;

"(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

"(iv) there is a reasonable expectation of receiving more than one sealed bid; and

"(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

"(b)(1) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service if the agency head determines that to do so—

"(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services;

"(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization; or

"(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

"(2) In fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, an executive agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

"(c) An executive agency may use procedures other than competitive procedures only when—

"(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

"(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals;

"(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

"(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

"(5) a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

"(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

"(7) the head of the executive agency—

"(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

"(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

"(d)(1) For the purposes of applying subsection (c)(1)—

"(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research

proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

“(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

“(2) The authority of the head of an executive agency under subsection (c)(7) may not be delegated.

“(e) An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) shall request offers from as many potential sources as is practicable under the circumstances.

“(f)(1) Except as provided in paragraph (2), an executive agency may not award a contract using procedures other than competitive procedures unless—

“(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

“(B) the justification is approved—

“(i) in the case of a contract for an amount exceeding \$100,000 (but equal to or less than \$1,000,000), by the competition advocate for the procuring activity (without further delegation);

“(ii) in the case of a contract for an amount exceeding \$1,000,000 (but equal to or less than \$10,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

“(iii) in the case of a contract for an amount exceeding \$10,000,000, by the senior procurement executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) (without further delegation); and

“(C) Any required notice has been published with respect to such contract pursuant to section 18 of the Office of Federal Procurement Policy Act and all bids or proposals received in response to such notice have been considered by such executive agency.

“(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required in the case of a procurement permitted by subsection (c)(7) or in the case of a procurement conducted under the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act.

"(3) The justification required by paragraph (1)(A) shall include—

"(A) a description of the agency's needs;

"(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

"(C) a determination that the anticipated cost will be fair and reasonable;

"(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

"(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

"(F) a statement of the actions, if any, the agency may take to remove or overcome a barrier to competition before a subsequent procurement for such needs.

"(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5, United States Code.

"(5) In no case may an executive agency—

"(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

"(B) procure property or services from another executive agency unless such other executive agency complies fully with the requirements of this title in its procurement of such property or services.

The restriction set out in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

"(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the regulations modified, in accordance with section 2752 of the Competition in Contracting Act of 1984 shall provide for special simplified procedures for small purchases of property and services.

"(2) For the purposes of this title, a small purchase is a purchase or contract for an amount which does not exceed \$25,000.

"(3) A proposed purchase or contract for an amount above \$25,000 may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase procedures required by paragraph (1).

"(4) In using small purchase procedures, an executive agency shall promote competition to the maximum extent practicable."

(2) Title III of such Act is further amended by inserting after section 303 the following new sections:

"PLANNING AND SOLICITATION REQUIREMENTS

"SEC. 303A. (a)(1) In preparing for the procurement of property or services, an executive agency shall—

"(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

"(B) use advance procurement planning and market research; and

“(C) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

“(2) Each solicitation under this title shall include specifications which—

“(A) consistent with the provisions of this title, permit full and open competition;

“(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

“(3) For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

“(A) function, so that a variety of products or services may qualify;

“(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

“(C) design requirements.

“(b) In addition to the specifications described in subsection (a), each solicitation for sealed bids or competitive proposals (other than for small purchases) shall at a minimum include—

“(1) a statement of—

“(A) all significant factors (including price) which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

“(B) the relative importance assigned to each of those factors; and

“(2)(A) in the case of sealed bids—

“(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

“(ii) the time and place for the opening of the sealed bids; or

“(B) in the case of competitive proposals—

“(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and

“(ii) the time and place for submission of proposals.

“EVALUATION AND AWARD

“Sec. 303B. (a) An executive agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation. 41 USC 253b.

“(b) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the agency head determines that such action is in the public interest.

“(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and, except as provided in subsection (b), shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The

award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(d)(1) The executive agency shall evaluate competitive proposals and may award a contract—

"(A) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

"(B) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government.

"(2) In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.

"(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(4) Except as otherwise provided in subsection (b), the executive agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only price and the other factors included in the solicitation. The executive agency shall award the contract by transmitting written notice of the award to such source and shall promptly notify all other offerors of the rejection of their proposals.

"(e) If the agency head considers that a bid or proposal evidences a violation of the antitrust laws, such agency head shall refer the bid or proposal to the Attorney General for appropriate action."

(3) Section 309 of such Act (41 U.S.C. 259) is amended by adding at the end thereof the following new subsections:

"(b) The term 'competitive procedures' means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes—

"(1) procurement of architectural or engineering services conducted in accordance with title IX of this Act (40 U.S.C. 541 et seq.);

"(2) the competitive selection of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals; and

"(3) the procedures established by the Administrator for the multiple awards schedule program of the General Services Administration if—

"(A) participation in the program has been open to all responsible sources; and

"(B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government.

"(c) The terms 'full and open competition' and 'responsible source' have the same meanings provided such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)."

(b) The table of contents of such Act is amended by striking out the item relating to section 303 and inserting in lieu thereof the following:

"Sec. 303. Competition requirements.

"Sec. 303A. Planning and solicitation requirements.

"Sec. 303B. Evaluation and award."

(c) The amendments made by this section do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)). 41 USC 253 note.

COST OR PRICING DATA

SEC. 2712. Section 304 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254) is amended by adding at the end thereof the following new subsection:

"(d)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of such contractor's or subcontractor's knowledge and belief, the cost or pricing data submitted were accurate, complete, and current—

"(A) before the award of any prime contract under this title using procedures other than sealed-bid procedures, if the contract price is expected to exceed \$100,000;

"(B) before the pricing of any contract change or modification, if the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the agency head;

"(C) before the award of a subcontract at any tier, when the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed \$100,000; or

"(D) before the pricing of any contract change or modification to a subcontract covered by clause (C), if the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the agency head.

"(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the agency head that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the price as is practicable), were inaccurate, incomplete, or noncurrent.

"(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the proposal for the contract, the discussions conducted on the proposal, pricing, or performance of the contract or subcontract.

"(4) When cost or pricing data are not required to be submitted by this subsection, such data may nevertheless be required by the agency if the agency head determines that such data are necessary for the evaluation by the executive agency of the reasonableness of the price of the contract or subcontract.

"(5) The requirements of this subsection need not be applied to contracts or subcontracts—

"(A) where the price is based on—

- "(i) adequate price competition,
- "(ii) established catalog or market prices of commercial items sold in substantial quantities to the general public, or
- "(iii) prices set by law or regulation, or
- "(B) in exceptional cases, where the agency head determines that the requirements of this subsection may be waived and states in writing the reasons for such determination."

AUTOMATED DATA PROCESSING DISPUTE RESOLUTION

SEC. 2713. (a) Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) is amended by adding at the end thereof the following new subsection:

"(h)(1) Upon request of an interested party in connection with any procurement conducted under the authority of this section (including procurements conducted under delegations of procurement authority), the board of contract appeals of the General Services Administration (hereafter in this subsection referred to as the 'board'), shall review any decision by a contracting officer alleged to violate a statute or regulation. Such review shall be conducted under the standard applicable to review of contracting officer final decisions by boards of contract appeals. An interested party who has filed a protest under subchapter V of chapter 35 of title 31, United States Code, with respect to a procurement or proposed procurement may not file a protest with respect to that procurement or proposed procurement under this subsection.

Post, p. 1199.

"(2)(A) When a protest under this subsection is filed before the award of a contract in a protested procurement, the board, at the request of an interested party and within 10 days of the filing of the protest, shall hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the protested procurement on an interim basis until the board can decide the protest.

"(B) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority unless the Federal agency concerned establishes that—

- "(i) absent action by the board, contract award is likely to occur within 30 days of the hearing; and
- "(ii) urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

"(3)(A) If the Board receives notice of a protest under this subsection after the contract has been awarded but within 10 days after the contract award, the board shall, at the request of an interested party and within 10 days after the date of the filing of the protest, hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the challenged procurement on an interim basis until the board can decide the protest.

"(B) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority to acquire any goods or services under the contract which are not previously delivered and accepted unless the Federal agency concerned establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

"(4)(A) The board shall conduct such proceedings and allow such discovery as may be required for the expeditious, fair, and reasonable resolution of the protest.

"(B) Subject to any deadlines imposed by section 9(a) of the Contract Disputes Act of 1978 (41 U.S.C. 608(a)), the board shall give priority to protests filed under this subsection. The board shall issue its final decision within 45 working days after the date of the filing of the protest, unless the board's chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the board shall issue such decision within the longer period determined by the chairman.

"(C) The board may dismiss a protest the board determines is frivolous or which, on its face, does not state a valid basis for protest.

"(5)(A) In making a decision on the merits of protests brought under this section, the board shall accord due weight to the policies of this section and the goals of economic and efficient procurement set forth in this section.

"(B) If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement.

"(C) Whenever the board makes such a determination, it may, in accordance with section 1304 of title 31, United States Code, further declare an appropriate interested party to be entitled to the costs of—

"(i) filing and pursuing the protest, including reasonable attorney's fees, and

"(ii) bid and proposal preparation.

"(6)(A) The final decision of the board may be appealed by the head of the Federal agency concerned and by any interested party, including interested parties who intervene in any protest filed under this subsection, as set forth in the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

"(B) If the board revokes, suspends, or revises the procurement authority of the Administrator or the Administrator's delegation of procurement authority after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the suspension, revocation, or revision of such procurement authority or delegation.

"(C) Nothing contained in this subsection shall affect the board's power to order any additional relief which it is authorized to provide under any statute or regulation. However, the procedures set forth in this subsection shall only apply to procurements conducted under the authority contained in this section. In addition, nothing contained in this subsection shall affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States Claims Court.

"(8) Not later than January 15, 1985, the board shall **adopt** and issue such rules and procedures as may be necessary to the expeditious disposition of protests filed under the authority of this subsection.

"(9) For purposes of this subsection—

"(A) the term 'protest' means a written objection by an interested party to a solicitation by a Federal agency for bids or

proposals for a proposed contract for the procurement of property or services or a written objection to a proposed award or the award of such a contract; and

"(B) the term 'interested party' means, with respect to a contract or proposed contract described in subparagraph (A), an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."

Effective date.
40 USC 759 note.

(b) The amendment made by this section shall cease to be effective on January 15, 1988.

CONFORMING AMENDMENTS

SEC. 2714. (a)(1) Section 302 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 252) is amended—

(A) by striking out the second sentence in subsection (b); and

(B) by striking out subsections (c), (d), (e), and (f) and inserting in lieu thereof the following:

"(c)(1) This title does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using procedures other than sealed-bid procedures under section 303(a)(2)(A), if the conditions set forth in section 303(a)(2)(A) apply or the contract is to be performed outside the United States.

Ante, p. 1175.

"(2) Section 303(a)(2)(A) does not require the use of sealed-bid procedures in cases in which section 204(e) of title 23, United States Code, applies."

(2) The heading of section 304 of such Act (41 U.S.C. 254) is amended to read as follows:

"CONTRACT REQUIREMENTS"

(3) Section 304 of such Act (41 U.S.C. 254) is amended—

(A) by striking out "negotiated pursuant to section 302(c)" in the first sentence of subsection (a) and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures";

(B) by striking out "negotiated pursuant to section 302(c)" in the second sentence of subsection (a) and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures"; and

(C) by striking out "negotiated without advertising pursuant to authority contained in this Act" in the first sentence of subsection (c) and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures".

(4) Section 307 of such Act (41 U.S.C. 257) is amended—

(A) by striking out the first sentence of subsection (a) and inserting in lieu thereof the following: "Determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final. Such determinations or decisions may be made with respect to individual purchases or contracts or, except for determinations or decisions under sections 303, 303A, and 303B, with respect to classes of purchases or contracts.";

Ante, p. 1175.

(B) by striking out "Except as provided in subsection (b)," in the second sentence of subsection (a) and inserting in lieu thereof "Except as provided in section 303(d)(2),";

(C) by striking out "this chapter" in such sentence and inserting in lieu thereof "this Act";

(D) by striking out subsection (b);

(E) by striking out "by paragraphs (11), (12), (13), or (14) of section 302(c)," in subsection (c);

(F) by redesignating subsection (c) as subsection (b); and

(G) by striking out subsection (d).

(5) Section 308 of such Act (41 U.S.C. 258) is amended by striking out "entered into pursuant to section 302(c) without advertising," and inserting in lieu thereof "made or awarded after using procedures other than sealed-bid procedures".

(6) Section 310 of such Act (41 U.S.C. 260) is amended by striking out "section 302(c)(15) of this title without regard to the advertising requirements of sections 302(c) and 303" and inserting in lieu thereof "the provisions of this title relating to procedures other than sealed-bid procedures".

(b) The table of contents of such Act is amended by striking out the item relating to section 304 and inserting in lieu thereof the following:

"Sec. 304. Contract requirements."

Subtitle B—Amendments to Title 10, United States Code

DECLARATION OF POLICY

SEC. 2721. Section 2301 of title 10, United States Code, is amended to read as follows:

"§ 2301. Congressional defense procurement policy

"(a) The Congress finds that in order to ensure national defense preparedness, conserve fiscal resources, and enhance defense production capability, it is in the interest of the United States that property and services be acquired for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of Congress that—

"(1) full and open competitive procedures shall be used by the Department of Defense in accordance with the requirements of this chapter;

"(2) services and property (including weapon systems and associated items) for the Department of Defense be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States;

"(3) contracts, when appropriate, provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology;

"(4) contracts for advance procurement of components, parts, and materials necessary for manufacture or for logistics support of a weapon system should, if feasible and practicable, be entered into in a manner to achieve economic-lot purchases and more efficient production rates;

"(5) the head of an agency use advance procurement planning and market research and prepare contract specifications in such a manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired; and

"(6) the head of an agency encourage the development and maintenance of a procurement career management program to ensure a professional procurement work force.

"(b) Further, it is the policy of Congress that procurement policies and procedures for the agencies named in section 2303 of this title shall in accordance with the requirements of this chapter—

"(1) promote full and open competition;

"(2) be implemented to support the requirements of such agencies in time of war or national emergency as well as in peacetime;

"(3) promote responsiveness of the procurement system to agency needs by simplifying and streamlining procurement processes;

"(4) promote the attainment and maintenance of essential capability in the defense industrial base and the capability of the United States for industrial mobilization;

"(5) provide incentives to encourage contractors to take actions and make recommendations that would reduce the costs to the United States relating to the purchase or use of property or services to be acquired under contracts;

"(6) promote the use of commercial products whenever practicable; and

"(7) require descriptions of agency requirements, whenever practicable, in terms of functions to be performed or performance required.

"(c) Further, it is the policy of Congress that a fair proportion of the purchases and contracts entered into under this chapter be placed with small business concerns."

CLARIFICATION OF APPLICABILITY OF CHAPTER 137 OF TITLE 10 TO THE
SECRETARY OF DEFENSE; DEFINITIONS

SEC. 2722. (a) Section 2302 of title 10, United States Code, is amended to read as follows:

"§ 2302. Definitions

"In this chapter:

"(1) 'Head of an agency' means the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Transportation, and the Administrator of the National Aeronautics and Space Administration.

"(2) 'Competitive procedures' means procedures under which the head of an agency enters into a contract pursuant to full and open competition. Such term also includes—

"(A) procurement of architectural or engineering services conducted in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 541 et seq.);

"(B) the competitive selection for award of basic research proposals resulting from a general solicitation and the peer

review or scientific review (as appropriate) of such proposals; and

“(C) the procedures established by the Administrator of General Services for the multiple award schedule program of the General Services Administration if—

“(i) participation in the program has been open to all responsible sources; and

“(ii) orders and contracts under such program result in the lowest overall cost alternative to meet the needs of the United States.

“(3) The terms ‘full and open competition’ and ‘responsible source’ have the same meanings provided such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403).”

(b) Section 2303 of such title is amended—

Post. p. 1195.
10 USC 2303.

(1) in subsection (a)—

(A) by striking out “purchase, and contract to purchase,” and inserting in lieu thereof “procurement”;

(B) by striking out “named in subsection (b), and all services,” and inserting in lieu thereof “(other than land and all services”;

(C) by redesignating clauses (1) through (5) as clauses (2) through (6), respectively; and

(D) by inserting before clause (2) (as so redesignated) the following new clause:

“(1) The Department of Defense.”;

(2) by striking out subsection (b); and

(3) by redesignating subsection (c) as subsection (b).

PROCUREMENT PROCEDURES

Sec. 2723. (a)(1) Section 2304 of title 10, United States Code, is amended—

(A) by striking out subsections (a) through (e) and (g), (h), and (i);

(B) by redesignating subsection (f) as subsection (h); and

(C) by inserting after the section heading the following:

“(a)(1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services—

“(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

Post. p. 1203.

“(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

“(2) In determining the competitive procedure appropriate under the circumstances, the head of an agency—

“(A) shall solicit sealed bids if—

“(i) time permits the solicitation, submission, and evaluation of sealed bids;

“(ii) the award will be made on the basis of price and other price-related factors;

"(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

"(iv) there is a reasonable expectation of receiving more than one sealed bid; and

"(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

"(b)(1) The head of an agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service if the head of the agency determines that to do so—

"(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services;

"(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization; or

"(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

"(2) In fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, the head of an agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

"(c) The head of an agency may use procedures other than competitive procedures only when—

"(1) the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency;

"(2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;

"(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

"(4) the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

"(5) a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

"(6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

"(7) the head of the agency—

"(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

"(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

"(d)(1) For the purposes of applying subsection (c)(1)—

"(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

"(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the United States which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

"(2) The authority of the head of an agency under subsection (c)(7) may not be delegated.

"(e) The head of an agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) shall request offers from as many potential sources as is practicable under the circumstances.

"(f)(1) Except as provided in paragraph (2), the head of an agency may not award a contract using procedures other than competitive procedures unless—

"(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

"(B) the justification is approved—

"(i) in the case of a contract for an amount exceeding \$100,000 (but equal to or less than \$1,000,000), by the competition advocate for the procuring activity (without further delegation);

"(ii) in the case of a contract for an amount exceeding \$1,000,000 (but equal to or less than \$10,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

"(iii) in the case of a contract for an amount exceeding \$10,000,000, by the senior procurement executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) (without further delegation); and

5 USC 5332.

97 Stat. 1330.

Post, p. 1196.

"(C) any required notice has been published with respect to such contract pursuant to section 18 of the Office of Federal Procurement Policy Act and all bids or proposals received in response to that notice have been considered by the head of the agency.

"(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required in the case of a procurement permitted by subsection (c)(7) or in the case of a procurement conducted under the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act.

"(3) The justification required by paragraph (1)(A) shall include—

"(A) a description of the agency's needs;

"(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

"(C) a determination that the anticipated cost will be fair and reasonable;

"(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

"(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

"(F) a statement of the actions, if any, the agency may take to remove or overcome any barrier to competition before a subsequent procurement for such needs.

"(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5.

5 USC 552.

"(5) In no case may the head of an agency—

"(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

"(B) procure property or services from another agency unless such other agency complies fully with the requirements of this chapter in its procurement of such property or services.

The restriction contained in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

"(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the regulations modified in accordance with section 2752 of the Competition in Contracting Act of 1984 shall provide for special simplified procedures for small purchases of property and services.

Post, p. 1203.

"(2) For the purposes of this chapter, a small purchase is a purchase or contract for an amount which does not exceed \$25,000.

"(3) A proposed purchase or contract for an amount above \$25,000 may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase procedures required by paragraph (1).

"(4) In using small purchase procedures, the head of an agency shall promote competition to the maximum extent practicable."

(2) The heading of such section is amended to read as follows:

"§ 2304. Contracts: competition requirements".

(b) Section 2305 of such title is amended to read as follows: 10 USC 2305.

"§ 2305. Contracts: planning, solicitation, evaluation, and award procedures

"(a)(1)(A) In preparing for the procurement of property or services, the head of an agency shall—

"(i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

"(ii) use advance procurement planning and market research; and

"(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

"(B) Each solicitation under this chapter shall include specifications which—

"(i) consistent with the provisions of this chapter, permit full and open competition; and

"(ii) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law.

"(C) For the purposes of subparagraphs (A) and (B), the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(i) function, so that a variety of products or services may qualify;

"(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(iii) design requirements.

"(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for small purchases) shall at a minimum include—

"(A) a statement of—

"(i) all significant factors (including price) which the head of the agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(ii) the relative importance assigned to each of those factors; and

"(B)(i) in the case of sealed bids—

"(I) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(II) the time and place for the opening of the sealed bids; or

"(ii) in the case of competitive proposals—

"(I) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and

"(II) the time and place for submission of proposals.

(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

"(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest.

"(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(4)(A) The head of an agency shall evaluate competitive proposals and may award a contract—

"(i) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

"(ii) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States.

"(B) In the case of award of a contract under subparagraph (A)(i), the head of the agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.

"(C) In the case of award of a contract under subparagraph (A)(ii), the head of the agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(D) Except as provided in paragraph (2), the head of the agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only price and the other factors included in the solicitation. The head of the agency shall award the contract by transmitting written notice of the award to such source and shall promptly notify all other offerors of the rejection of their proposals.

"(5) If the head of an agency considers that a bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action."

(c) The amendments made by this section do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

10 USC 2304
note.

COST OR PRICING DATA; CONFORMING AMENDMENTS

SEC. 2724. (a) The second sentence of subsection (a) of section 2306 of title 10, United States Code, is amended to read as follows: "Subject to the limitation in the preceding sentence, the other provisions of this section, and other applicable provisions of law, the head of an agency, in awarding contracts under this chapter after using procedures other than sealed-bid procedures, may enter into any kind of contract that he considers will promote the best interests of the United States".

(b) Subsection (b) of such section is amended by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "awarded under this chapter after using procedures other than sealed-bid procedures".

(c) Subsection (c) of such section is amended by striking out "section 2304 of this title," and inserting in lieu thereof "this chapter".

(d) Subsection (e) of such section is amended by striking out "\$25,000 or" in clause (2) and inserting in lieu thereof "the greater of (A) the small purchase amount under section 2304(g) of this title, or (B)".

(e) Subsection (f) of such section is amended—

(A) in paragraph (1)—

(i) by striking out "his" in the matter preceding clause (A) and inserting in lieu thereof "such contractor's or subcontractor's";

(ii) by striking out "he" in the matter preceding clause (A);

(iii) by striking out "negotiated prime contract under this title where" in clause (A) and inserting in lieu thereof "prime contract under this chapter entered into after using procedures other than sealed-bid procedures, if";

(iv) by striking out "for which" in clauses (B) and (D) and inserting in lieu thereof "if";

(v) by striking out "where" in clause (C) and inserting in lieu thereof "when";

(vi) by striking out "\$500,000" each place it appears and inserting in lieu thereof "\$100,000"; and

(vii) by striking out "prior to" each place it appears and inserting in lieu thereof "before";

(B) in paragraph (2), by striking out "negotiated" both places it appears;

(C) by redesignating paragraph (3) as paragraph (5) and striking out "negotiation," in such paragraph and inserting in lieu thereof "proposal for the contract, the discussions conducted on the proposal,";

(D) by inserting a period after "noncurrent" in paragraph (2);

(E) by striking out "Provided, That the requirements" in paragraph (2) and inserting in lieu thereof the following:

"(3) The requirements"; and

(F) by inserting after paragraph (3) (as designated by clause (E)) the following new paragraph:

"(4) When cost or pricing data is not required to be submitted by this subsection, such data may nevertheless be required by the head of the agency if the head of the agency determines that such data is necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract."

(f) The heading of such section is amended to read as follows:

"§ 2306. Kinds of contracts; cost or pricing data: truth in negotiation".

DETERMINATIONS AND DECISIONS

SEC. 2725. Section 2310 of title 10, United States Code, is amended—

(1) in subsection (a)—

(A) by inserting “, except for determinations and decisions under section 2304 or 2305 of title,” in the first sentence after “contract or”; and

(B) by inserting “, including a determination or decision under section 2304 or 2305 of this title,” in the second sentence after “decision”; and

(2) by striking out subsection (b) and inserting in lieu thereof the following:

“(b) Each determination or decision under section 2306(c), 2306(g)(1), 2307(c), or 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that—

“(1) clearly indicate why the type of contract selected under section 2306(c) of this title is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract;

“(2) support the findings required by section 2306(g)(1) of this title;

“(3) clearly indicate why advance payments under section 2307(c) of this title would be in the public interest; or

“(4) clearly indicate why the application of section 2313(b) of this title to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest. Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies.”.

LIMITATION ON AUTHORITY TO DELEGATE CERTAIN FUNCTIONS

SEC. 2726. Section 2311 of title 10, United States Code, is amended—

(1) by striking out “The head” and inserting in lieu thereof “Except as provided in section 2304(d)(2) of this title, the head”; and

(2) by striking out “chapter” and all that follows and inserting in lieu thereof “chapter.”.

CONFORMING AMENDMENTS

SEC. 2727. (a) The table of sections at the beginning of chapter 137 of title 10, United States Code, is amended—

(1) by striking out the item relating to section 2301 and inserting in lieu thereof the following:

“2301. Congressional defense procurement policy.”; and

(2) by striking out the items relating to sections 2304, 2305, and 2306 and inserting in lieu thereof the following:

“2304. Contracts: competition requirements.

“2305. Contracts: planning, solicitation, evaluation, and award procedures.

“2306. Kinds of contracts; cost or pricing data: truth in negotiation.”.

(b) Subsection (h) of section 2304 of such title (as redesignated by section 2723(a)(1)(B)) is amended—

(1) by striking out “negotiated under this section” and inserting in lieu thereof “awarded after using procedures other than sealed-bid procedures”; and

(2) by striking out "formal advertising" and inserting in lieu thereof "sealed-bid procedures".

(c) Section 2313(b) of such title is amended by striking out "negotiated under this chapter" and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures". 10 USC 2313.

(d) Section 2356 of such title is amended by striking out "the formal advertising prescribed by section 2305 of this title" and inserting in lieu thereof "a solicitation for sealed bids under chapter 137 of this title". 10 USC 2356.

Subtitle C—Amendments to the Office of Federal Procurement Policy Act

DEFINITIONS

SEC. 2731. The section of the Office of Federal Procurement Policy Act relating to definitions (41 U.S.C. 403) is redesignated as section 4 and is amended— 97 Stat. 1326.

(1) by striking out "and" at the end of paragraph (4);

(2) by striking out the period at the end of paragraph (5) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following new paragraphs:
 "(6) the term 'competitive procedures' means procedures under which an agency enters into a contract pursuant to full and open competition;

"(7) the term 'full and open competition', when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement; and

"(8) the term 'responsible source' means a prospective contractor who—

"(A) has adequate financial resources to perform the contract or the ability to obtain such resources;

"(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

"(C) has a satisfactory performance record;

"(D) has a satisfactory record of integrity and business ethics;

"(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

"(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

"(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations."

PROCUREMENT NOTICE AND RECORDS; ADVOCATES FOR COMPETITION

SEC. 2732. (a) The Office of Federal Procurement Policy Act is further amended by adding at the end thereof the following new sections:

"PROCUREMENT NOTICE

41 USC 416.

"SEC. 18. (a)(1) Except as provided in subsection (c)—

"(A) an executive agency intending to solicit bids or proposals for a contract for property or services for a price expected to exceed \$10,000 shall furnish for publication by the Secretary of Commerce a notice described in subsection (b); and

"(B) an executive agency awarding a contract for property or services for a price exceeding \$25,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

Commerce
Business Daily,
publication

"(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

"(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice of a solicitation to the Secretary of Commerce, such executive agency may not—

"(A) issue such solicitation earlier than 15 days after the date on which such notice is published by the Secretary of Commerce; or

"(B) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than 30 days after the date on which such solicitation is issued.

"(b) Each notice required by subsection (a)(1)(A) shall include—

"(1) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(2) the name, business address, and telephone number of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(3) the name, business address, and telephone number of the contracting officer;

"(4) a statement that all responsible sources may submit a bid, proposal, or quotation which shall be considered by the executive agency; and

"(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source.

"(c)(1) A notice is not required under subsection (a)(1) if—

"(A) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

"(B) the proposed procurement would result from acceptance of any unsolicited proposal that demonstrates a unique and innovative research concept, and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal;

"(C) the procurement is made against an order placed under a requirements contract, or

"(D) the procurement is made for perishable subsistence supplies.

"(2) The requirements of subsection (a)(1)(A) do not apply to any procurement under conditions described in clause (2), (3), (4), (5), or (7) of section 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) or clause (2), (3), (4), (5), or (7) of section 2304(c) of title 10, United States Code.

Ante. p. 1175.
Ante. p. 1187.

"(3) The requirements of subsection (a)(1)(A) shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, with the concurrence of the Administrator, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

"RECORD REQUIREMENTS

"SEC. 19. (a) Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements, other than small purchases, in such fiscal year. 41 USC 417.

"(b) The record established under subsection (a) shall include—

"(1) with respect to each procurement carried out using competitive procedures—

"(A) the date of contract award;

"(B) information identifying the source to whom the contract was awarded;

"(C) the property or services obtained by the Government under the procurement; and

"(D) the total cost of the procurement;

"(2) with respect to each procurement carried out using procedures other than competitive procedures—

"(A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);

"(B) the reason under section 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) or section 2304(c) of title 10, United States Code, as the case may be, for the use of such procedures; and

"(C) the identity of the organization or activity which conducted the procurement.

Ante. p. 1175.
Ante. p. 1187.

"(c) The information that is included in such record pursuant to subsection (b)(1) and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated 'noncompetitive procurements using competitive procedures'.

"(d) The information included in the record established and maintained under subsection (a) shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 6(d)(4).

"ADVOCATES FOR COMPETITION

"SEC. 20. (a)(1) There is established in each executive agency an advocate for competition. 41 USC 418

"(2) The head of each executive agency shall—

"(A) designate for the executive agency and for each procuring activity of the executive agency one officer or employee serving in a position authorized for such executive agency on the date of enactment of the Competition in Contracting Act of 1984 (other than the senior procurement executive designated pursuant to section 16(3)) to serve as the advocate for competition;

Ante. p. 1175.
97 Stat. 1330.
41 USC 414

"(B) not assign such officers or employees any duties or responsibilities that are inconsistent with the duties and responsibilities of the advocates for competition; and

"(C) provide such officers or employees with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition, such as persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

"(b) The advocate for competition of an executive agency shall—
 "(1) be responsible for challenging barriers to and promoting full and open competition in the procurement of property and services by the executive agency;

"(2) review the procurement activities of the executive agency;

"(3) identify and report to the senior procurement executive of the executive agency designated pursuant to section 16(3)—

"(A) opportunities and actions taken to achieve full and open competition in the procurement activities of the executive agency; and

"(B) any condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

"(4) prepare and transmit to such senior procurement executive an annual report describing—

"(A) such advocate's activities under this section;

"(B) new initiatives required to increase competition; and

"(C) barriers to full and open competition that remain;

"(5) recommend to the senior procurement executive of the executive agency goals and the plans for increasing competition on a fiscal year basis;

"(6) recommend to the senior procurement executive of the executive agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs; and

"(7) describe other ways in which the executive agency has emphasized competition in programs for procurement training and research.

"(c) The advocate for competition for each procuring activity shall be responsible for challenging barriers to and promoting full and open competition in the procuring activity, including unnecessarily detailed specifications and unnecessarily restrictive statements of need.

"ANNUAL REPORT ON COMPETITION

41 USC 419.

"SEC. 21. (a) Not later than January 31 of each of 1986, 1987, 1988, 1989, and 1990, the head of each executive agency shall transmit to each House of Congress a report including the information specified in subsection (b).

"(b) Each report under subsection (a) shall include—

"(1) a specific description of all actions that the head of the executive agency intends to take during the current fiscal year to—

97 Stat. 1330.
41 USC 414.

Report.

“(A) increase competition for contracts with the executive agency on the basis of cost and other significant factors; and

“(B) reduce the number and dollar value of noncompetitive contracts entered into by the executive agency; and

“(2) a summary of the activities and accomplishments of the advocate for competition of the executive agency during the preceding fiscal year.”.

(b)(1) Section 6(e) of such Act (41 U.S.C. 405(e)) is amended by striking out “subsection (c)” and inserting in lieu thereof “subsection (d)”.

97 Stat. 1326.

(2) Section 16(1) of such Act (41 U.S.C. 414(1)) is amended to read as follows:

97 Stat. 1330.

“(1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;”.

Subtitle D—Procurement Protest System

PROCUREMENT PROTEST SYSTEM

SEC. 2741. (a) Chapter 35 of title 31, United States Code, is amended by adding at the end thereof the following new subchapter:

“SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM

“§ 3551. Definitions

31 USC 3551.

“In this subchapter—

“(1) ‘protest’ means a written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract;

“(2) ‘interested party’, with respect to a contract or proposed contract described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract; and

“(3) ‘Federal agency’ has the meaning given such term by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).

“§ 3552. Protests by interested parties concerning procurement actions

31 USC 3552.

“A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter. An interested party who has filed a protest under section 111(h) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(h)) with respect to a procurement or proposed procurement may not file a protest with respect to that procurement under this subchapter.

Ante. p. 1182

31 USC 3553.

"§ 3553. Review of protests; effect on contracts pending decision*Post.* p. 1202.

"(a) Under procedures prescribed under section 3555 of this title, the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party.

"(b)(1) Within one working day of the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.

Report.

"(2) Except as provided in paragraph (3) of this subsection, a Federal agency receiving a notice of a protested procurement under paragraph (1) of this subsection shall submit to the Comptroller General a complete report (including all relevant documents) on the protested procurement—

"(A) within 25 working days from the date of the agency's receipt of that notice;

"(B) if the Comptroller General, upon a showing by the Federal agency, determines (and states the reasons in writing) that the specific circumstances of the protest require a longer period, within the longer period determined by the Comptroller General; or

Post. p. 1201.

"(C) in a case determined by the Comptroller General to be suitable for the express option under section 3554(a)(2) of this title, within 10 working days from the date of the Federal agency's receipt of that determination.

"(3) A Federal agency need not submit a report to the Comptroller General pursuant to paragraph (2) of this subsection if the agency is sooner notified by the Comptroller General that the protest concerned has been dismissed under section 3554(a)(3) of this title.

"(c)(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending.

"(2) The head of the procuring activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

"(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General under this subchapter; and

"(B) after the Comptroller General is advised of that finding.

"(3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days thereafter.

"(d)(1) If a Federal agency receives notice of a protest under this section after the contract has been awarded but within 10 days of the date of the contract award, the Federal agency (except as provided under paragraph (2)) shall, upon receipt of that notice, immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending.

"(2) The head of the procuring activity responsible for award of a contract may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

“(A) upon a written finding—

“(i) that performance of the contract is in the best interests of the United States; or

“(ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and

“(B) after the Comptroller General is notified of that finding.

“(e) The authority of the head of the procuring activity to make findings and to authorize the award and performance of contracts under subsections (c) and (d) of this section may not be delegated.

“(f) Within such deadlines as the Comptroller General prescribes, upon request each Federal agency shall provide to an interested party any document relevant to a protested procurement action (including the report required by subsection (b)(2) of this section) that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive.

“§ 3554. Decisions on protests

31 USC 3554.

“(a)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter. Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within 90 working days from the date the protest is submitted to the Comptroller General unless the Comptroller General determines and states in writing the reasons that the specific circumstances of the protest require a longer period.

“(2) The Comptroller General shall, by regulation prescribed pursuant to section 3555 of this title, establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 45 calendar days from the date the protest is submitted.

Post, p. 1202.

“(3) The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest.

“(b)(1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency—

“(A) refrain from exercising any of its options under the contract;

“(B) recompute the contract immediately;

“(C) issue a new solicitation;

“(D) terminate the contract;

“(E) award a contract consistent with the requirements of such statute and regulation;

“(F) implement any combination of recommendations under clauses (A), (B), (C), (D), and (E); or

“(G) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

“(2) If the head of the procuring activity responsible for a contract makes a finding under section 3553(d)(2)(A)(i) of this title, the Com-

Ante, p. 1200.

troller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, recommitting, or reawarding the contract.

"(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of—

"(A) filing and pursuing the protest, including reasonable attorneys' fees; and

"(B) bid and proposal preparation.

"(2) Monetary awards to which a party is declared to be entitled under paragraph (1) of this subsection shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services.

"(d) Each decision of the Comptroller General under this subchapter shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to the interested parties, the head of the procuring activity responsible for the solicitation, proposed award, or award of the contract, and the senior procurement executive of the Federal agency involved.

"(e)(1) The head of the procuring activity responsible for the solicitation, proposed award, or award of the contract shall report to the Comptroller General, if the Federal agency has not fully implemented those recommendations within 60 days of receipt of the Comptroller General's recommendations under subsection (b) of this section.

Report.

"(2) Not later than January 31 of each year, the Comptroller General shall transmit to Congress a report describing each instance in which a Federal agency did not fully implement the Comptroller General's recommendations during the preceding fiscal year.

31 USC 3555.

"§ 3555. Regulations; authority of Comptroller General to verify assertions

Ante. p. 1201.

"(a) Not later than January 15, 1985, the Comptroller General shall prescribe such procedures as may be necessary to the expeditious decision of protests under this subchapter, including procedures for accelerated resolution of protests under the express option authorized by section 3554(a)(2) of this title. Such procedures shall provide that the protest process may not be delayed by the failure of a party to make a filing within the time provided for the filing.

31 USC 701 *et seq.*

"(b) The Comptroller General may use any authority available under chapter 7 of this title and this chapter to verify assertions made by parties in protests under this subchapter.

31 USC 3556.

"§ 3556. Nonexclusivity of remedies; matters included in agency record

Ante. p. 1200.

"This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States Claims Court. In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter

with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review."

(b) The analysis for such chapter is amended by adding at the end thereof the following:

"SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM

"3551. Definitions.

"3552. Protests by interested parties concerning procurement actions.

"3553. Review of protests; effect on contracts pending decision.

"3554. Decisions on protests.

"3555. Regulations; authority of Comptroller General to verify assertions.

"3556. Nonexclusivity of remedies; matters included in agency record."

Subtitle E—Effective Date; Regulations; Study

EFFECTIVE DATES

Sec. 2751. (a) Except as provided in subsection (b), the amendments made by this title shall apply with respect to any solicitation for bids or proposals issued after March 31, 1985. 41 USC 251 note.

(b) The amendments made by section 2713 and subtitle D shall apply with respect to any protest filed after January 14, 1985. Ante, pp 1182, 1199.

MODIFICATION OF FEDERAL ACQUISITION REGULATIONS

Sec. 2752. Not later than March 31, 1985, the single Government-wide procurement regulation referred to in section 4(4)(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) shall be modified to conform to the requirements of this title and the amendments made by this title. 41 USC 403 note. Ante, p. 1195.

STUDY OF ALTERNATIVES

Sec. 2753. (a) Not later than January 31, 1985, the Administrator of the Office of Federal Procurement Policy, in consultation with the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration, shall complete a study of alternatives and recommend to the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House of Representatives a plan to increase the opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of professional, technical, and managerial services. 41 USC 407 note.

(b) Such plan shall provide for testing the recommended alternative and be developed in accordance with section 15 of the Office of Federal Procurement Policy Act (41 U.S.C. 413), and be consistent with the policies set forth in section 2 of such Act (41 U.S.C. 401). 97 Stat. 1329 97 Stat. 1325.

98TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
98-861

DEFICIT REDUCTION ACT
OF 1984

THE COMMITTEE OF CONFERENCE

SUBMITTED THE FOLLOWING

CONFERENCE REPORT

[To accompany H.R. 4170]



JUNE 23, 1984.—Ordered to be printed

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TITLE VII—COMPETITION IN CONTRACTING

The Senate amendment, which is identical to S. 338, the Competition in Contracting Act of 1983, is designed to increase the use of competition in Government contracting and to impose more stringent restrictions on the awarding of noncompetitive—sole-source—contracts. Agencies are required under the Senate amendment to use competitive procedures, whether by inviting sealed bids or requesting competitive proposals, unless a statutory exception allowing the use of noncompetitive procedures is met. S. 338 had been reported unanimously by the Senate Governmental Affairs and Armed Services Committees and passed unanimously by the Senate.

The Senate amendment builds on the two primary procurement statutes—the Armed Services Procurement Act, which governs the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, and the Federal Property and Administrative Services Act, which generally applies to civil agencies—to establish a uniform framework which distinguishes between competitive and noncompetitive procedures. The amendments proposed to both statutes are largely identical.

The conferees adopted a substitute to the Senate amendment which represents a compromise between S. 338 and two House measures—H.R. 5184, the Competition in Contracting Act of 1984, which was ordered reported by the House Government Operations Committee, and H.R. 2545, the Defense Procurement Reform Act of 1983, which is under consideration by the House Armed Services Committee.

The conference substitute retains the major provisions of the Senate amendment, incorporates “full and open” as the required standard for competition, strengthens the justification, approval, and notice requirements to safeguard against unnecessary sole-source contracts, establishes competition advocates to enhance accountability, and strengthens the bid protest process.

While the conference substitute adopts the statutory framework of the Senate amendment, the conferees agree further to amend the Office of Federal Procurement Policy Act and the Budget and Accounting Act. The OFPP Act, a statute which governs all federal agencies, is amended to define certain procurement terms, such as “full and open competition” and “responsible source,” to establish notice and reporting requirements, and to create competition advocates in all procuring activities. The Budget and Accounting Act is amended to provide the General Accounting Office with a statutory base for its bid protest function.

MAJOR PROVISIONS

Subtitle A—Amendments to the Federal Property and Administrative Services Act

Section 2711—Procurement Procedures

(1) Competition Requirements

Senate amendment

The Senate amendment establishes "effective" competition as the standard for awarding federal contracts for property or services. In Government contracting, effective competition is a marketplace condition which results when two or more contractors, acting independently of each other and of the Government, submit bids or proposals in an attempt to secure the Government's business.

Conference substitute

The conference substitute uses "full and open" competition as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids or proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received.

The conference substitute retains the requirement from the Senate amendment that executive agencies shall use competitive procedures—whether by soliciting sealed bids and making award without discussions or by requesting competitive proposals and making award with discussions—when entering into a contract for property or services.

In effect, the substitute, like the Senate amendment, removes the restriction from—and the written justification required for—competitive proposal procedures and places them on par with sealed bid procedures. The substitute maintains minimum criteria for sealed bid procedures to ensure their use when appropriate. The purpose served by substituting the new terms "sealed bid" and "competitive proposal" procedures for "formal advertising" and "negotiation" is to eliminate the competitive and noncompetitive connotations associated, respectively, with past terminology.

The substitute defines the term "competitive procedures" to mean procedures under which an executive agency enters into a contract pursuant to full and open competition, thereby permitting all responsible sources to compete. This term also recognizes as competitive the procurement of architectural and engineering services conducted in accordance with title IX of the Federal Property and Administrative Services Act, the competitive selection of basic research proposals, and the General Services Administration (GSA) multiple awards schedule programs.

The selection of architectural and engineering services by the Federal Government is governed by the provisions of 40 U.S.C. 541 *et seq.*, which require the selection to be made on the basis of an

evaluation of the design proposals and the qualifications of all offerors. After the selection of the most qualified offeror, the government then negotiates a contract at a fair and reasonable price not to exceed six percent of the estimated cost of the project. If an agency is unable to negotiate such a contract, then the agency is required to negotiate a contract with the next most qualified firm. The principle behind this procedure is to ensure that the government receives quality, up-front design work in its procurement of architectural and engineering services. This is particularly important since such design work has a major impact on the overall cost of the project.

The conferees also recognize the competitive selection of basic research, which is directed toward increasing knowledge of a subject apart from any clear or necessary practical application of that knowledge, to be a competitive procurement procedure. These basic research procurements are unique in that the agency's solicitations are general in nature, identifying areas of research interest, criteria for selecting proposals (including scientific merit), and the method of evaluating proposals. Proposals received are then competitively evaluated through a peer review process before contracts are awarded. By recognizing such procurement of basic research as competitive, the conferees intend to promote the participation of all individuals or companies capable of supporting the government's needs in this important area. Any agency procurement which cannot meet this standard and, in fact, restricts participation, must be justified and approved under the requirements in this substitute for other than competitive procurement procedures.

The substitute also contains a provision that preserves the multiple awards schedule programs administered by the General Services Administration. Although agency implementation of these programs has been criticized in the past, the conferees believe that schedule contracts are a worthwhile method of meeting agency needs for a broad range of commercial products, while imposing a minimum administrative burden on the using agencies. Schedule contracts should be used when GSA can negotiate quantity-discount contracts, with delivery to be made directly to the using agencies in small quantities at diverse locations. The GSA Federal Supply Schedule is an example of this program.

By providing the GSA multiple awards schedule programs with a statutory base, the conferees intend that any responsible vendor wishing to compete for this business is, in fact, allowed and encouraged to compete. As long as the schedule contracts managed by GSA maintain this objective, GSA is complying with the intent of this substitute and should be supported. The conferees believe, however, that the availability of ADP schedule contracts should not preclude the requirement for agencies to seek lower prices if there are responsible alternative sources available.

The conferees also intend that where competition is conducted among all sources that have been prequalified, in accordance with statute and regulations, and where prequalification is essential to ensure satisfaction of an agency's needs, such procedures shall be considered full and open competitive procedures, provided all responsible sources are given a reasonable opportunity to qualify.

(2) Dual-Sourcing Authority

Senate amendment

The Senate amendment authorizes executive agencies to establish or maintain an alternative source or sources of supply for a particular property or service by using competitive procedures to allow all sources to compete while excluding the incumbent contractor from competition. Executive agencies are authorized to use this "dual-sourcing" authority only when it would (1) increase or maintain competition and likely result in reduced overall costs, (2) be in the interest of national defense in case of a national emergency or industrial mobilization, or (3) be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or non-profit institution or a federally funded research and development center.

Conference substitute

The conference substitute substantially incorporates the provisions of the Senate amendment.

(3) Small Business Set-Aside Competition

Senate amendment

The Senate amendment recognizes various existing set-aside programs by authorizing an executive agency to include in its solicitations restrictive provisions which would designate only specified categories of offerors, such as small business concerns, as "authorized by law," for example, the Small Business Act (15 U.S.C. § 631, *et seq.*).

Conference substitute

The conferees seek to give more precise recognition to set-aside programs authorized by statute. For example, Congress has historically provided assistance through the Federal procurement process to small businesses. In recognition of this policy, the conferees include a provision in the conference substitute which authorizes agencies to limit competition to small business concerns or socially and economically disadvantaged small business concerns as long as all such firms within the categories are allowed to compete. The conferees specifically note the Small Business Innovation Research (SBIR) Program, established under P.L. 97-219, as an example of a statutorily authorized small business set-aside program that would be included in this provision.

Further, the set-aside procurements must be made in accordance with the competitive procedures required by the conference substitute and with the statutory requirements of the Small Business Act. Finally, procurements conducted under Section 8(a) of the Small Business Act are exempt from the procurement procedures mandated by the substitute.

(4) Exceptions to Competition Requirement

Senate amendment

The Senate amendment provides six exceptions to competitive procedures which parallel the conditions which the Comptroller General has historically recognized as legitimate conditions for awarding contracts on a sole-source basis. The Senate amendment shifts the emphasis from having to justify the use of negotiation, which can be either competitive or noncompetitive, to concentrate on those contract which are negotiated noncompetitively, thereby restricting sole-source contracting to when it is truly necessary. The award of a contract on a sole-source basis would for the first time constitute a clear violation of statute and would therefore not be authorized unless permitted by one of these exceptions.

These exceptions are considerably more restrictive than the present exceptions to formal advertising which are used inappropriately, in many cases, to justify going sole source. By using the broad exceptions to formal advertising, such as the "impracticable to obtain competition" exception, as a means to negotiate noncompetitive, agencies have avoided stating the actual justification for awarding a sole-source contract. While sole-source contracting may be necessary in certain situations, tighter control and greater visibility are needed to ensure its proper use.

Conference substitute

The conference substitute retains the restrictions imposed on sole-source contracts provided in the Senate amendment, but requires agencies to obtain competition under the second and sixth exception to the maximum extend practicable. For this reason, the term "noncompetitive procedures" used in the Senate amendment has been changed to "procedures other than competitive procedures" in the conference substitute. Agencies are not precluded from awarding a contract noncompetitively under the second or sixth exceptions (which concern urgent and national security situations) when conditions dictate that only one source is available.

In addition, the conference substitute includes a seventh exception which allows the head of an agency, on a non-delegable basis, to determine when it is necessary in the public interest to use procedures other than competitive procedures for a particular procurement. This waiver is to be exercised, if at all, on a case-by-case basis, rather than for a class of procurements. The head of an agency is required to notify both Houses of Congress in writing of his or her intention to use this exception thirty days before the contract is awarded.

The conference agreement also clarifies that sole-source awards resulting from certain unsolicited proposals or "follow-on" contracts fall under the first exception, which permits a sole-source award when the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the agency's needs. In neither case, however, is this exception to be used as a "carte blanche" justification for going sole source.

The use of the first exception for unsolicited proposals and follow-on contracts is limited in both cases to certain specific condi-

tions. In the case of unsolicited proposals, the conference substitute authorizes sole-source awards based on unsolicited research proposals when the agency can determine that the substance of the proposal is not otherwise available to the government, and the proposal does not resemble the substance of a pending competitive procurement.

The conferees do not intend, however, that this provision be used as a loophole by which agencies and contractors can circumvent the competition requirements contained in the substitute. This authorization is strictly limited to state-of-the-art proposals which represent advanced scientific knowledge. Even under these conditions, agencies should seek proposals wherever possible from competing researchers to ensure that the best proposal available is selected. The substitute, like the Senate amendment, therefore, requires that unsolicited proposals be publicized in the *Commerce Business Daily* unless such publication would result in the disclosure of the originality of thought or innovativeness of the proposed research contained in the proposal.

In the case of follow-on contracts, a sole-source award under the first exception may be made for the continued development or production of a major system or highly specialized equipment if award to other than the original source would result in substantial duplication of cost that could not be recovered through the use of competition, or unacceptable delays in fulfilling the agency's needs.

The conferees intend that follow-on contracts be awarded only to incumbent vendors who receive the original contracts following some form of price or technical competition. The conference substitute recognizes that in major systems and highly specialized equipment acquisitions, there are situations where the initial capital investment could cause substantial duplication of cost if the contract were awarded to other than the original source. However, the substitute requires the agency to determine and document that such cost cannot be offset by savings that would result from openly competing the requirement. The conferees believe that a cost/benefit analysis is necessary to make a precise determination.

The conferees further note that follow-on contracts sometimes result when an agency fails to determine its original requirements accurately. The conferees emphasize that better planning should eliminate this problem and the resultant need for a sole-source contract to the incumbent contractor. The language in the conference substitute should not be construed as legitimizing sole-source contracts that are caused by poor planning.

The conferees also do not intend this provision to be used to perpetuate any contract which involves obsolete or outmoded facilities, systems or processes, including computer systems and software.

(5) Justification and Approval Procedures

Senate amendment

The Senate amendment safeguards against unnecessary sole-source contracting by prohibiting agencies from using noncompetitive procedures unless (1) the use of such procedures has been justified in writing, and (2) the agency has provided advance notice of intent to award a sole-source contract in the *Commerce Business*

Daily, inviting bids or proposals from potential competitors, and has considered all bids or proposals received in response to such notice.

Conference substitute

The conference substitute retains the pre-award notification requirements from the Senate amendment which agencies must first meet before a sole-source award can be made.

In retaining the Senate provisions, the conferees emphasize that agencies should, at a minimum, give each bid or proposal received in response to the *Commerce Business Daily* notice sufficient consideration so as to be able to make an informed judgment about the responsibility of the bidder and the responsiveness of the bid.

Agencies are not explicitly required to issue solicitation packages to all contractors who respond to a pre-award notice. This is not to be interpreted to mean that agencies are authorized to deny the distribution of such packages arbitrarily. The purpose of the pre-award notice is to open competition to all offerors who can meet the agency's needs. To serve this purpose, solicitation packages should be available upon request. In situations where competition is not anticipated and solicitation packages have not been prepared, agencies shall provide potential competitors who do respond with solicitation packages or comparable information.

The conference substitute also strengthens the justification procedures in the Senate amendment and establishes new requirements for approvals of sole-source contracts.

The justification statement required for each noncompetitive procurement must be certified as accurate and complete by the contracting officer responsible for awarding the contracts. The justification statement must then be reviewed and approved by either (1) the procuring activity's advocate for competition in the case of contracts over \$100,000; (2) the head of the procuring activity in the case of contracts over \$1,000,000; or (3) the agency's senior procurement executive in the case of contracts over \$10,000,000. Contracting officer certification and review and approval authorities provided by this substitute cannot be delegated, except as specifically authorized under this substitute.

All determinations and decisions required for use of the exceptions to competitive procedures provided in this substitute are to be made on a case-by-case basis. Broad categories or classes of products and services cannot be exempt from competitive procedures.

In the event of an unusual and compelling urgency, the required justification and approvals may be made after the contract has been awarded. Similarly, such justifications and approvals are not required when the head of an agency determines and reports to Congress that it is in the public interest to conduct a noncompetitive procurement, or a procurement is conducted in accordance with the Wagner-O'Day Act (41 U.S.C. § 46 *et seq.*).

The justifications and related documentation are required to be made available to the public. While these disclosures should be made consistent with the provisions of the Freedom of Information Act (5 U.S.C. § 552), the conferees intend that the Act's exemption for internal memoranda not be used to shield these documents from public disclosure. The use of the term "consistent with" is de-

signed merely to ensure that national security, law enforcement, and other sensitive information is not publicly disclosed.

The conference substitute places additional prohibitions and restrictions on the use of procedures other than competitive procedures. Noncompetitive procurements may not be justified on the basis of concerns regarding the future availability of funding. This prohibition is designed to prevent the year-end spending abuses that occur when agencies are faced with large amounts of unexpended appropriations at the end of the fiscal year. Under this situation, agencies rush to sign a contract with a vendor on a sole-source basis in order to avoid having to turn money back to the Treasury. The conferees find this practice to be unconscionable. Similarly, the substitute prohibits the use of the lack of advance planning as a justification for using noncompetitive practices. The conferees reject the assertions made by some agency procurement officials that this is a legitimate reason to curtail competition. A contrary conclusion would legitimize unacceptable management practices.

The substitute also prohibits an agency from procuring its goods and services from another agency unless that agency has complied with the requirements of the substitute. The substitute includes this prohibition to prevent one agency from acquiring its goods and services from another agency's sole-source contract without having to justify a noncompetitive procurement itself. This restriction is in addition to, not in lieu of, any other restriction provided by law, including the Economy Act of 1932 (31 U.S.C. § 686(a)).

(6) Small Purchase Procedures

Senate amendment

The Senate amendment recognizes that the competitive procedures required of large purchases may not be appropriate for small purchases. The Senate amendment therefore provides a basis in statute for regulations to establish separate small purchase procedures, allowing agencies to scale down their efforts as long as they obtain reasonable competition.

Conference substitute

The small purchase provisions of the Senate amendment are retained under the conference substitute in a separate subsection. Within this new subsection, agencies are required to promote competition to the maximum extent practicable when using small purchase procedures. The regulations issued pursuant to this subsection are to be incorporated into the government-wide Federal Acquisition Regulation consistent with current statute.

(7) Planning and Solicitation Procedures

Senate amendment

The Senate amendment requires agencies, as part of the affirmative effort to obtain competition, to use advance procurement planning, conduct market research, and develop nonrestrictive specifications.

Conference substitute

The conference substitute retains these requirements contained in the Senate amendment, but applies them as planning requirements for all procurements—competitive and noncompetitive.

The substitute also retains the broad guidelines set forth in the solicitation section of the Senate amendment for agencies to follow in defining their needs in order to maximize, rather than limit, competition. The substitute authorizes agencies to specify their needs in either functional, performance, or detailed design terms, whichever will ensure timely performance and will promote the use of full and open competition.

Wherever practical, the conferees strongly believe that contractors should be told what the Government needs in functional terms. This approach allows the Government to take advantage of the innovative ideas of the private sector.

(8) Evaluation and Award Procedures*Senate amendment*

The evaluation and award procedures for sealed bids and competitive proposals set forth in the Senate amendment are largely the same as those currently required in the Armed Services Procurement Act and the Federal Property and Administrative Services Act for formal advertising and negotiation. The amendment clarifies that agencies shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

Conference substitute

The conference substitute retains the evaluation and award procedures under the Senate amendment, and modifies the language to reflect the requirement for full and open competition.

Section 2712—Truth in Negotiations*Senate amendment*

The Senate amendment extends the statutory requirement in the Armed Services Procurement Act for submitting certified cost or pricing data to cover civilian procurements under the Federal Property and Administrative Services Act, and establishes a uniform threshold in both statutes at \$100,000.

Contractors are presently required by statute to submit cost or pricing data and certify that the data are "accurate, complete, and current" prior to the award of any negotiated defense contract over \$500,000 and are required by regulation to submit such data for any negotiated civilian contract over \$100,000. The purpose of this "truth-in-negotiations" provision is to provide the basis for retroactive price adjustment in the event that data submitted prior to the award of a contract were not accurate, complete, and current, without resorting to costly and time-consuming litigation. Without certification, agencies lack the legal ammunition to deter defective pricing.

Conference substitute

The conference substitute retains the Senate provisions and, in addition, authorizes contracting officers to request cost or pricing data for defense and civilian procurements under \$100,000. Obtaining such data for small dollar contracts has proven to be a problem in purchasing spare parts, where excessive over-charges have become legendary.

Section 2713—Automated Data Processing Dispute Resolution

Senate amendment

The Senate amendment contains no provision on automated data processing dispute resolution.

Conference substitute

The conference substitute amends Section 111 of the Federal Property and Administrative Services Act of 1949 to provide an alternate forum for resolving contractual disputes involving procurements of automated data processing (ADP) equipment and services conducted under Public Law 89-306 (the Brooks Act). This provision applies only to those automated data processing procurements conducted under the Brooks Act, and it does not apply to those ADP procurements exempted under the 1982 Department of Defense Authorization Act. ADP procurements conducted by DOD are exempt from the Brooks Act only if the equipment and services are primarily for functions involving intelligence, cryptology, command and control, weapon systems, or similar type systems. Protests over ADP procurements in those areas not covered by the Brooks Act will continue to be heard by the GAO or the courts, as under current practice.

The Brooks Act, enacted in 1965, provides the General Services Administration (GSA) with the sole authority to procure ADP equipment and services for federal agencies either by conducting the procurement on behalf of the agency, or by granting a delegation of procurement authority to the agency to conduct its own procurements. The Brooks Act has opened the federal marketplace to all responsible computer companies. However, due to the increasing number of computer procurements conducted every year, coupled with the complexity of the technology, the current informal process of resolving conflicts between the buying agency and the suppliers has become cumbersome and prolonged. Further, charges have been made by both the agencies and the contractors that GSA's current process does not provide an objective forum for dispute resolution. The conferees believe that it has become increasingly apparent that a new forum is needed to provide a fair, equitable and timely remedy in this area.

The conference substitute provides that remedy by authorizing the GSA Board of Contract Appeals to consider protest cases involving ADP procurements conducted under P.L. 89-306. The Board is well suited to hear protests of this nature. First, the Board can use already established procedures to hold hearings, compel production of documents, obtain testimony of witnesses, and conduct cross-examination under oath. Second, the Board can use the

authority which GSA currently has under the Brooks Act to revoke, suspend or modify a delegation of procurement authority. Further, the Board is authorized to suspend any contract which was awarded pursuant to P.L. 89-306.

The conference substitute requires that an initial hearing be held by the Board within ten days of the filed protest, and that the Board then issue its final decision within 45 working days from the date of the protest unless its chairman determines that specific and unique circumstances require a longer period for consideration. Based upon the results of the initial hearing, the Board can suspend the delegation of procurement authority while the protest is pending. The suspension of a solicitation or contract performance shall not be ordered if the agency establishes that urgent and compelling circumstances exist. In addition, the conference substitute authorizes the Board to award the costs of pursuing a protest if such protest action is sustained by the Board.

The conferees recognize that these provisions provide a unique and innovative method of handling protests of a highly technical and complex nature. The conferees believe that the Board is well equipped to provide timely resolution of conflicts between the procuring agencies and the suppliers of computer products and services. To avoid disrupting legitimate procurements, and especially to prevent protest actions taken in bad faith from interrupting contract performance, the Board is authorized to dismiss at any point in the process any protest action that it determines to be frivolous or which, on its face, does not state a valid basis for the protest.

The conference substitute establishes a three-year sunset provision which should allow Congress to make a full and objective evaluation of the Board's operations in resolving ADP contractual disputes prior to the consideration of reauthorization.

Subtitle B—Amendments to the Armed Services

Procurement Act

Section 2721—Defense Procurement Policy

Senate amendment

The Senate amendment contains no provisions directly amending the existing policy section in the Armed Services Procurement Act.

Conference substitute

The conference substitute amends the existing policy section in the Armed Services Procurement Act to set forth broad defense procurement policy which, first and foremost, directs the Department of Defense, the military services, the Coast Guard, and the National Aeronautics and Space Administration to use full and open competitive procedures in acquiring property and services. The other policy statements included in the conference substitute are intended to conform with the policies set out in section 2 of the Office of Federal Procurement Policy Act.

Sections 2722 and 2723

Senate amendment and conference substitute

The remaining sections under Subtitle B of the conference substitute parallel sections 2711 and 2712 of Subtitle A and the explanations of the provisions are the same and the conferees' intentions with respect to these provisions are the same.

Subtitle C—Amendments to the Office of Federal Procurement Policy Act

Section 2731—Definitions

Senate amendment

The Senate amendment did not amend the OFPP Act.

Conference substitute

The conference substitute defines the terms "full and open competition" to mean that all responsible sources are permitted to submit sealed bids or competitive proposals; "competitive procedures" to mean the procedures under which an agency enters into a contract pursuant to full and open competition; and "responsible source" to mean a prospective contractor who is capable of satisfying the agency's needs, considering resources, delivery or performance schedule, performance record, integrity and business ethics, organization and experience, equipment and facilities, and any other qualifications. These terms are used throughout the conference substitute.

Section 2732—Procurement Notice and Records; Advocate for Competition

(1) Procurement Notice Requirements

Senate amendment

The Senate amendment establishes notice provisions in the Armed Services Procurement Act and the Federal Property and Administrative Services Act which require a notice to be published in the Commerce Business Daily for (1) prospective competitive and noncompetitive contracts over \$10,000, and (2) contract awards over \$10,000 for those contracts which are likely to result in the award of subcontracts. The burden is placed on the procuring agency, under this provision, to furnish the information for publication to the Secretary of Commerce, who is responsible for publishing the notice promptly in the Commerce Business Daily.

The Senate amendment establishes time periods for publication, specifies the information which a proper notice should include, and provides exceptions to the notice requirement which are separate but identical in almost all cases to the exceptions for noncompetitive procedures.

Conference substitute

The conference substitute retains, with minor modifications, the notice requirements set forth in the Senate amendment, but con-

solidates the dual-conforming amendments to the defense and civilian procurement statutes by placing a uniform notice requirement in the Office of Federal Procurement Policy Act.

(2) Record Requirements

Senate amendment

The Senate amendment facilitates congressional oversight of contracting activities by requiring agencies to establish and maintain a record, by fiscal year, of the procurements (other than small purchases) in which noncompetitive procedures are used. The information to be included in the record, which would be transmitted on a quarterly basis to the Federal Procurement Data System, designates the contractor who received the award, the property or services which were obtained, the dollar value, the reason for using noncompetitive procedures, and the positions of the individuals in the procuring agency who required and approved the sole-source award.

Conference substitute

The conference substitute retains the record requirements of the Senate amendment, again consolidating the amendments to the defense and civilian procurement statutes into a uniform provision in the OFPP Act, but expands application of this provision to include all procurements—competitive and noncompetitive—in a computerized file. This file should be indexed in a manner to provide ready access to such information by other agencies, Congress, and the public.

(3) Advocate for Competition

Senate amendment

The Senate amendment establishes in each executive agency the position of advocate for competition with responsibilities for promoting competition in the agency's procurement process. The agency competition advocate is designed to be at a sufficiently high level to directly influence the procurement policies and procedures within the agency, while not being directly responsible for the individual procurements. The head of each agency is prohibited from assigning duties to the competition advocate which are inconsistent with the advocate's responsibility to promote competition. As such, the position of competition advocate should not be assigned to any individual who is responsible for the initiation or conduct of any specific agency procurement.

Conference substitute

The conferees recognize the importance of the position of competition advocate and the need to ensure that key Federal officials at all levels are made aware of the benefits of competition and become firmly committed to its use. To further these goals, the conference substitute expands the agency advocate's responsibilities and requires the establishment of an additional advocate for competition in each procuring activity.

The substitute requires the competition advocates to challenge barriers to, and promote full and open competition in, the procurement of property and services. Under the review and approval procedures established by the conference substitute, the procuring activities' competition advocates are responsible for approving all noncompetitive contract awards which involve expenditures exceeding \$100,000 but less than \$1,000,000. Further, the agency advocate is given the additional responsibilities of recommending to the agency's senior procurement executive (1) goals and plans for increasing competition on a fiscal-year basis, and (2) a system of personal and organizational accountability designed to encourage the procurement workforce to emphasize competition.

The conferees recommend that the performance ratings of procurement personnel include an appraisal of their efforts to promote competition in agency procurements.

(4) Annual Report on Competition

Senate amendment

The Senate amendment requires the head of each executive agency to issue an annual report to Congress on the agency's use of competition in contracting. Specifically, the report should provide an overview of the actions taken by the agency to increase competitive contracting and reduce the number and dollar value of noncompetitive contracts, and the activities and accomplishments of the agency's advocate for competition.

Conference substitute

The conference substitute incorporates the annual report requirement from the Senate amendment and establishes January 31 as the deadline for submission to Congress for fiscal years 1986 through 1990.

(5) Competition Requirement

Senate amendment

The Senate amendment has no comparable provision.

Conference substitute

The conference substitute amends Section 16(1) of the OFPP Act (executive agency responsibilities) to require the use of full and open competition in executive agency procurements of property and services. Language contained in this substitute requires agencies, when using competitive procedures, to establish policies, procedures, and practices necessary to ensure that a sufficient number of sealed bids or competitive proposals are received from responsible sources to fulfill the government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or services procured. This requirement applies to all agency procurements, including those made under set-aside programs.

Subtitle D—Amendments to the Budget and Accounting Act

Section 2751—Procurement Protest System

Senate amendment

The Senate amendment contains no provisions regarding the General Accounting Office bid protest system.

Conference substitute

The conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief. To accomplish this, the conference substitute adds a new subchapter to Chapter 35 of Title 31, United States Code, which codifies and strengthens the bid protest function currently in operation at the General Accounting Office (GAO). The provisions of this section become effective on January 15, 1985.

The conference substitute establishes an enforcement mechanism keyed to the procedures contained in the Senate amendment for solicitation, notice, evaluation, and award. The procurement protest system further relies on record requirements in the Senate amendment, as expanded in the conference substitute, to insure the availability of information needed not only by the Comptroller General to make determinations in procurement protests, but also by interested parties to identify, and initiate action against, solicitations and awards which they believe are unlawful.

The Comptroller General is not given exclusive authority to hear protests. The conferees do not intend, for example, that the GAO decide matters dealing with the Small Business Administration's responsibilities under the Small Business Act to establish industry size standards or to issue Certificates of Competency to small businesses. Finally, interested parties with recourse to the General Services Administration Board of Contract Appeals in disputed computer procurements may not protest the same action to both the GAO and the GSA board.

Any actual or prospective bidder of offeror whose direct economic interest would be affected by the award of or failure to award a procurement contract by an executive agency may challenge the agency's solicitation, award or proposed award by filing a protest with the Comptroller General. Final agency determinations under section 307 of the Federal Property and Administrative Services Act and section 2310 of title 10, United States Code, may be the subjects of protests to GAO, the courts, and where appropriate, the GSA board.

Once a protest has been filed with GAO, the Comptroller General shall notify the executive agency involved within one day of receipt of the protest. The executive agency then has 25 working days (10 if the Comptroller General selects the "express option") to respond. The Comptroller General must issue his opinion within 90 working days (45 calendar days under the express option). The Comptroller General may extend the deadlines when appropriate for specific protests, on a case-by-case basis; the conferees regard

such extensions as exceptional, however, and to be used in unique circumstances only.

If, when a protest is filed, the contract in question has not yet been awarded, an award may not be made unless the head of procuring activity responsible finds and reports to the Comptroller General that urgent and compelling circumstances which significantly affect the interests of the United States will not permit awaiting the Comptroller General decision. (This finding may be made only if the award is likely to occur within 30 calendar days.) If a protest is filed within 10 days after award of the contract, performance shall cease and all related activities which may result in additional obligations being incurred by the United States must be suspended, unless the head of the procuring activity informs the Comptroller General that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the Comptroller General's decision, or that performance of the contract is in the best interest of the United States.

Before notifying the Comptroller General that continued performance of a disputed contract is in the government's best interest, however, the head of the procuring activity should consider potential costs to the government from carrying out relief measures as may be recommended by the Comptroller General if the protest is subsequently sustained. This is to insure that if the Comptroller General sustains a protest, such forms of relief as termination, re-competition, or re-award of the contract will be fully considered for recommendation. Agencies in the past have resisted such recommendations on the grounds that the government's best interest would not be served by relief measures of this sort because of the added expenses involved. This provision is designed to preclude that argument in the future, and thus to avoid prejudicing those relief measures in the Comptroller General's review.

If the Comptroller General determines that a protested procurement action has involved government non-compliance with statutes or regulations, the Comptroller General is required to recommend corrective action to the executive agency responsible, and the head of the procuring activity involved must notify the Comptroller General if the agency has not implemented the recommendations within 60 calendar days. This provision does not preclude the Comptroller General from requesting the agencies to notify the GAO of the status of any other recommendation. An annual report of all notifications received by the Comptroller General, describing each instance of non-implementation, must be submitted to Congress.

The Comptroller General may grant to a successful protesting party reimbursement for expenses of preparing bids or proposals related to the disputed contracting action and for costs incurred in making the protest. These costs shall be paid from the procurement funds (not necessarily funds for the specified procurement which was challenged) of the executive agency involved.

The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a valid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due

performance of contracts from being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit. Finally, the conferees expect that the Comptroller General will declare monetary awards only in cases where the agencies have unfairly excluded vendors from procurements, and not in cases involving minor technicalities.

The Comptroller General currently receives from courts and agencies requests concerning the propriety of procurements. The conferees intend that the Comptroller General have the discretion to continue to process these requests in a manner consistent with the one used for bid protests.

The conference substitute also includes a section regarding alternative remedies. The subchapter regarding bid protests does not alter the current rights of any person to seek administrative or judicial review of any alleged violation of a procurement statute or regulation. Further, documents related to a Comptroller General's decision on a procurement and the agency's response to such decision must be made a part of the agency record and be made available to the courts in the event a suit is filed against the agency involving the procurement.

Subtitle E—Effective Date: Regulations; Study

Section 2751—Effective Date

Senate amendment

The Senate amendment applies to any solicitations for bids or proposals issued on or after the date 270 days after enactment.

Conference substitute

The conference substitute establishes April 1, 1985, which is approximately 270 days from the anticipated date of enactment, as the effective date. The substitute also establishes January 15, 1985, which allows approximately 180 days for implementation, as the effective date for the bid protest provision.

Section 2752—Modification of the Federal Acquisition Regulation

Senate amendment

The Senate amendment has no comparable provision.

Conference substitute

The conference substitute requires that the Federal Acquisition Regulation (FAR) shall be modified by March 31, 1985, to conform to the requirements set forth in this substitute. Modification shall also be made to the FAR within this time period to reflect policy directives issued by the Office of Federal Procurement Policy.

The conferees note with considerable concern that the system established to maintain the FAR is not working. Presently, FAR maintenance is jointly vested in two procurement regulatory councils, the Defense Acquisition Regulatory (DAR) Council, established by the Secretary of Defense, and the Civilian Agency Acquisition Council (CAAC), established pursuant to the FAR. Under the maintenance procedures prescribed by the FAR, both councils must con-

sider and approve each proposed modification or addition to the FAR.

Given this cumbersome maintenance system, the conferees note that, to date, the regulatory councils have failed to implement both statutory changes and OFPP policy directives. Given the currently limited role accorded to OFPP in the FAR maintenance system, the conferees are concerned that the continuing lack of leadership for the FAR maintenance system will perpetuate the untimely implementation of FAR changes required by statute or OFPP policy directives.

By statute, the OFPP Administrator is empowered to issue procurement regulations, procedures or forms when the two regulatory councils are unable to agree or fail to take action. In the event that conflict or inaction precludes the two councils from meeting the April 1, 1985, deadline for implementing the modifications to the FAR pursuant to this substitute, the OFPP Administrator must intervene to issue the regulations by this deadline. Further, the conferees believe that the OFPP Administrator should be accorded a greater role in managing the FAR maintenance process on a continuing basis.

Section 2753—Study

Senate amendment

The Senate amendment has no comparable provision.

Conference substitute

The conference substitute requires the Office of Federal Procurement Policy to recommend to Congress a plan for increasing the use of full and open competition in the procurement of professional, technical and managerial services. This category of procurements often involves the use of evaluation criteria, other than price, in the selection of the winning vendor.

The Office of Federal Procurement Policy is directed to recommend competitive selection procedures for procurements where price is not a significant factor and the agency has determined a legitimate need for the best or highest quality proposal. Such a plan should include requirements for the agencies to follow to ensure that all responsible vendors are allowed to compete for the above procurements and that fair and reasonable prices are paid for the service. OFPP should consider, as a possible alternative prior to designing a plan, a system in which all qualified persons capable of providing specified services are placed on a list maintained by the government, in which each of those persons is encouraged to submit a competitive proposal in response to each solicitation for such services, and in which the award is made to the bidder on the list who can perform the service for the lowest overall cost.

The Office of Federal Procurement Policy should also, in conducting the study, consult with experts in such fields as soil engineering, real estate appraising, surveying and mapping, and other professional services which do not fit within the traditional concept of Federal procurement procedures.

24. July 16, 1984.--"Competition Bid Protest Provisions Enacted by Congress Are 'Far-Reaching'," Federal Contracts Report, Vol. 42, p. 81.

(Vol. 42) 81



News

Contract Policy

COMPETITION, BID PROTEST PROVISIONS ENACTED BY CONGRESS ARE 'FAR-REACHING'

Government and industry officials may have differing views on the competition and bid protest provisions recently enacted by Congress (42 FCR 3, 28), but all agree that the provisions will have a profound effect on federal procurement.

Assistant Deputy Under Secretary of Defense (Acquisition) Harvey Gordon calls the package of provisions "the most far-reaching change in procurement since 1947." He expressed particular concern about the agencies' ability to train personnel and to prepare implementing regulations in such a short time (the bid protest provisions take effect Jan. 15, 1985; the competition provisions, April 15, 1985).

Gordon described the provisions as "a patchwork of many items which, viewed individually, have an understandable objective, but which in the aggregate are burdensome." He reiterated DOD's longstanding position that precise management actions are best left to agency management discretion.

He noted that the provisions "would have been given much more careful review" had they been free-standing legislation instead of being incorporated into a tax measure.

Gordon also observed that the changes come at a bad time for DOD, which is in the process of trying to adjust to the new Federal Acquisition Regulation, as well as gearing up for the changes in the areas of data rights and warranties that Congress is expected to approve in the FY 1985 DOD authorization measure now in conference.

"It's like starting over again," he commented.

Administrative Burden Feared

Robert Trimble, Vice President for Contracts at Martin Marietta Corp., has no quarrel with the general thrust of the competition or bid protest provisions, but he does take issue with the lowering of the threshold for requiring certification of cost or pricing data, and with the three-tiered requirements for approval of the justification for sole source awards.

Trimble said that those two provisions will "substantially increase the administrative workload" involved in the contract process. Regarding the certification threshold, he noted that the Defense Contract Audit Agency is already "almost overwhelmed" by trying to review cost or pricing data in a timely manner, and that lowering the threshold from \$500,000 to \$100,000 will only exacerbate the situation.

In addition, Trimble asserted that the payoff to the government as a result of lowering the threshold does not justify the extra time and effort involved.

Besides, Trimble pointed out that nothing in current

law precludes a contracting officer from obtaining cost or pricing data on awards under \$500,000, even though the contractor does not presently have to certify that the data submitted on such contracts is complete, accurate, and current.

Similarly, the requirements for higher approval of the contracting officer's justification for a proposed noncompetitive award, and the restrictions on delegating that approval authority, will require an "enormous" amount of effort and "could delay" the procurement process, Trimble maintained.

The new statute requires that the competition advocate for the contracting activity approve the justification for contracts over \$100,000. In the case of contracts over \$1 million, the head of the procuring activity must give the approval, and in the case of contracts over \$10 million, the agency's senior procurement executive must approve the justification.

As for codifying and expanding GAO's role in the bid protest procedure, Trimble has no objections. He says "no one else is better equipped" to handle bid protests than GAO. While he regards the 90-day requirement for resolving protests as "rigid," at the same time he favors putting some time constraints into the process to "speed things up."

"On balance, it's responsible legislation," Trimble concluded.

Separation of Powers Issue

Irving Jaffe, partner in the Washington, D.C. law firm of Pettit & Martin, believes that giving GAO the authority to hear bid protests may contravene the separation of powers doctrine of the Constitution. GAO, being a legislative entity, "has no business" telling executive agencies what to do, Jaffe contends.

He predicts that losers in bid protests will challenge the constitutionality of the provision.

Jaffe also anticipates that giving GAO the authority to award attorneys' fees will increase litigation.

Regarding the competition provisions, Jaffe views the removal of the preference for formal advertising as a "positive change." However, he said that the seven exceptions to the requirement for competition may not necessarily contribute to the goal of obtaining the best product at the lowest price. The exceptions may be viewed as loopholes, with the result that everyone in the procurement process will focus on them. This will add to administrative costs and "force everyone to become a decisionmaker," Jaffe concluded.

Prof. John Whelan of the Hastings College of Law maintained that, in addition to raising constitutional questions, the GAO bid protest procedure is "unnecessary," since such matters may be settled in either the Claims Court or the District Court. Having GAO hear protests merely "clutters the picture," he said.

As for the competition provisions, Whelan noted that the changes should not really surprise anyone,

since they have been talked about as far back as the Commission on Government Procurement some 10 years ago. How effective the new restrictions on non-competitive procurement will be depends on how they are implemented, he added.

GAO, GSA's Views

John Brosnan, a senior attorney in GAO's office of the general counsel, predicted that the new bid protest provisions will increase GAO's caseload, and says that GAO "may have to add to its staff" in order to accommodate the increase.

However, he insisted that the way the bid protest provisions are written, there is "no constitutional problem." Brosnan pointed out that under the provisions, it is the executive agency, and not GAO, that actually withholds an award, suspends contract performance, and takes corrective action.

Brosnan said that GAO hopes to issue for comment in the fall proposed regulations to implement the bid protest provisions.

As for the competition provisions, Brosnan said that "time will tell" if the seven exceptions are tight enough. He noted that the legislation appears to provide a "workable framework, but you can't legislate competition."

Brosnan also indicated that the seventh exception, which allows the head of an agency to determine when a noncompetitive award is necessary in the public interest, is undoubtedly the broadest and offers the great potential for abuse. However, he conceded that a catchall provision is needed, adding that the approval level and congressional notification required under that exception appear to be "proper controls."

Leonard Suchanek, chairman of the GSA Board of Contract Appeals, is confident that the GSA board "has the necessary expertise to meet the challenge Congress has placed on us in a most credible manner."

The provisions make the board an alternative forum for three years for disputes involving ADP equipment.

Suchanek told FCR that the GSA board is the "logical place" to handle ADP protests because under the Brooks Act, GSA is the central repository for ADP procurement.

Suchanek anticipates a "dramatic increase" in workload, and says he will move quickly to fill the two vacancies on the board. He says there are two reasons for the expected increase in workload. First, the board will have the authority to award attorneys' fees, which is bound to be a powerful incentive to bring protests before it. Secondly, the 45-day time frame that the provisions establish for resolving ADP protests will utilize considerably more resources than are currently required.

Suchanek's staff has already begun drafting the implementing rules for the new bid protest procedures, and he expects the draft rules to be put out for comment in the early fall.

Finally, Suchanek notes that the bid protest provisions will take effect two and one-half months before the competition provisions. Thus, there will be a rather awkward transition period in which protests will be heard under the new bid protest rules—but the existing competition rules.

Defense Program

NAVY TO SEEK SECOND SOURCE FOR PHOENIX MISSILE

The Navy announced July 6 that it will seek a second source to make the advanced version of the Phoenix missile, but said the plan had nothing to do with its decision, announced only hours before, to temporarily refuse to accept any more of the missiles from the current producer, Hughes Aircraft, until the company improves its quality control procedures.

The Navy statement indicated that the decision to seek a second source for the missile is simply part of a "Navy-wide effort" to increase competition.

Last month, following inspection of a Phoenix missile, the Navy informed Hughes that it would not accept any more missiles pending further review of the firm's quality control procedures. The Navy claims it uncovered evidence of "marginal workmanship" indicating poor quality control at the firm's Tucson, Ariz. plant, where the missile is made. A Navy spokesman said the inspection revealed "a broad spectrum of deficiencies."

A statement issued by Hughes defended the firm's record in meeting the Navy's specifications for the missile. However, the firm pledged to correct the problems uncovered by the inspection.

The Pentagon has requested \$482 million for the Phoenix for FY 1985. The missiles cost about \$1 million each.

The Navy expects to make its choice for a second source by FY 1986. The new source probably would not replace Hughes as sole producer of the missile. Rather, each firm would produce a share of each year's buy.

Compared to the two earlier versions, the advanced version of the missile, the AIM-54C, is designed to have improved guidance and electronics.

Contract Policy

PENTAGON IMPOSES DOD-WIDE MORATORIUM ON DISPOSAL OF SURPLUS EQUIPMENT

The Pentagon has ordered a DOD-wide moratorium on the disposal of surplus military equipment, following the disclosure that the Air Force has routinely sold supposedly unused items for a fraction of their worth, only to buy back some of them later at higher prices.

The action, which was taken by Assistant Secretary of Defense for Manpower, Installations and Logistics Lawrence Korb July 2 and announced by the Pentagon July 9, applies to all military services plus the Defense Logistics Agency. Korb indicated that although DOD believes that current disposal policies are basically sound, even minor procedural discrepancies can have significant dollar impact where multi-billion dollar inventories are concerned. "Our objective is to catch and correct these discrepancies before they become major problems," he explained.

In fiscal 1983, DOD disposed of some \$3.5 billion in surplus equipment, ranging from spare parts to entire

25. May 8, 1984.--GAO Letter Report (B-208159) commenting on Justice Department's letter of April 20, 1984 on H.R. 5184.



COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON D.C. 20548

B-208159

May 8, 1984

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MAY 8 1984

HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

You ask us to comment on a letter dated April 20, 1984, from the Department of Justice (Department) regarding H.R. 5184, a bill "to revise the procedures for soliciting and evaluating bids and proposals for government contracts using full and open competition, and for other purposes."

The Department states the bill, which would authorize the General Accounting Office (GAO) to take a formal role in the awarding of government contracts, raises substantial constitutional problems and permits an unnecessary and unwise intrusion into executive branch activities. Specifically, the Department points to the provisions that would authorize federal courts to refer bid protests to GAO, would provide for a stay of the award or performance of a contract pending GAO consideration of a protest, and would authorize GAO to grant the costs of pursuing a protest, including attorney fees.

The Department states that these provisions call for the exercise of either executive or judicial authority and that the head of GAO, the Comptroller General, as an officer of the legislative branch of government cannot exercise executive or judicial authority without violating the doctrine of separation of powers. The Department cites Buckley v. Valeo, 424 U.S. 1, 139 (1976), for this proposition and it cites INS v. Chadha, 103 S. Ct. 2764 (1983), for the proposition that Congress may not stay the award or performance of a contract pending review by a legislative official.

We point out first that GAO already has a formal role in the awarding of executive branch contracts. GAO has been deciding executive branch contract award protests for about 60 years based on its authority to determine the legality of public expenditures. See 31 U.S.C. § 3526 (1982). Indeed, GAO has become the principal forum for resolving the protests of disappointed bidders.

Over the years the bid protest process has been an integral part of the government's procurement system. That system is administered under a complex array of laws and regulations designed to achieve beneficial results through fair treatment of those bidding for the government's business. An effective protest process not only assures that the thousands of procurement officials administering this complex system observe the procurement laws and regulations, it also serves to assure bidders that they will be treated fairly.

All concerned with the government's procurement process rely upon bid protest decisions as the definitive body of administrative law governing the award process. GAO decisions are used by the Congress, the courts, and the procurement community, including the executive branch contracting agencies. Executive branch procurement regulations have long recognized GAO's bid protest role.

In fact, the bill would not give GAO any more authority to decide protests than it now exercises. The bill would not authorize GAO to suspend the award or performance of a government contract while a protest is pending or to determine the form of relief that must be provided by agencies once a protest is decided. Although the bill generally calls for agencies to suspend the award or performance of a contract pending a GAO decision, agencies would be authorized to override this general requirement in appropriate cases. GAO would only declare whether awards or proposed awards comply with law and regulation, recommend a form of relief when appropriate, and provide monetary relief where warranted. With the exception of granting attorney fees GAO now makes these determinations under existing procedures with full cooperation of the executive branch and often upon requests

for assistance from the judicial branch. We do not view the addition of recognizing payment of attorney fees in appropriate cases as a significant extension of authority in a constitutional sense.

The bill would give specific statutory recognition to GAO as an arbiter of executive branch contract award protests. It appears to be the statutory recognition of the function rather than execution of the function itself which forms the basis of Department's constitutional argument. The Department argues that the Comptroller General is a legislative officer and that the Congress may not constitutionally authorize a legislative officer to decide bid protests.

The Comptroller General's status does not constitutionally prevent him from performing the audit and settlement of accounts functions. As indicated above, the bill would not authorize the Comptroller General to order contracting agencies to take specific actions. He would only, as under present procedures, declare whether particular contract awards comport with law and regulation. We fail to understand why statutory recognition of the current bid protest process leads to a determination of unconstitutionality.

The Buckley v. Valeo case, *supra*, dealt with a situation where congressionally appointed officers were given executive functions to perform. The Supreme Court held that these officers could not constitutionally perform executive functions since they had not been appointed to office by the President. The Court noted that in contrast the Comptroller General is appointed by the President. *Id.* at 128 n. 165. We do not believe the holding in Buckley v. Valeo forecloses the Comptroller General's role as provided under H.R. 5184.

The Chadha case cited by the Department, simply stated, stands for the proposition that Congress may not overrule executive action outside of the legislative process. Because H.R. 5184 would require an executive agency to hold up the award or performance of its contract pending a decision on a protest by the Comptroller General, the Department argues that the Chadha holding would be violated.

The delay would not be for the purpose declared unconstitutional in *Chadha*. It would be for the purpose of providing the Comptroller General's views to the agency while meaningful relief could still be provided. Although procurements are to be delayed pending the outcome of protests at GAO, the bill does provide for override of the requirement for delay where the vital interests of the United States are involved. As we suggested in testimony before your Committee, it would be more appropriate to allow override of the delay requirement on the basis of a less rigid standard such as "the interests of the United States," which in turn would eliminate any question of constitutionality.

The provision in the bill authorizing federal courts to refer bid protests to GAO, merely codifies existing procedure. Since 1971 federal courts have requested advisory opinions from GAO in cases brought before them by disappointed bidders. See *Steinthal v. Seamans*, 455 F.2d 1289 (D.C. Cir. 1971); *Wheelabrator v. Chafee*, 455 F.2d 1306 (D.C. Cir. 1971). In those cases the courts specifically recognized GAO's bid protest competency and concluded that a judge's request for a nonbinding GAO opinion could provide a "felicitous blending of remedies and mutual reinforcement of forums." *Wheelabrator v. Chafee*, *supra*, at 1316. It is quite common for both the United States Claims Court and for federal district courts to make known their interest in having a GAO decision on a pending matter before rendering judgment on it. See *Drexel Heritage Furnishings, Inc. v. U.S.*, 4 Cl. Ct. 162 (1983); *Aero Corp v. Department of the Navy*, 558 F. Supp. 404 (D.D.C. 1983). We do not see how this well-established practice constitutes "usurping the judiciary's function" by GAO.

The Department objects to the payment of attorney fees in protest cases as encouraging baseless attacks on agency procurements. Attorney fees would not be allowed except where a protest had merit. In some of these cases, reimbursement of a protester's costs may be the only remedy possible. And it should be recognized that the protest process is a means for assuring the continuing integrity of

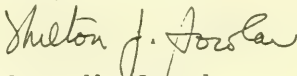
government procurements. There would not seem to be any sound basis for objecting to the payment of reasonable attorney fees in cases where protesters have served to correct procurement deficiencies.

The Department also objects to permitting any interested party to file a protest, arguing that it would not be in the public interest to allow parties other than bidders to interfere with the procurement of goods and services. The bill reflects current GAO bid protest procedures. GAO determines whether a party is an "interested party"--and thus eligible to protest a procurement--by considering the party's status in relation to the procurement, the nature of the issues involved and whether the circumstances show the existence of a direct or substantial economic interest. This standard is sufficient to prevent those without a legitimate interest from having their protests considered.

Finally, we note that the Department objects to the provision in the bill that would give the General Services Administration Board of Contract Appeals authority to decide protests involving certain types of procurements. We also question this provision as noted in our March 27 testimony on the bill.

We hope our comments are helpful.

Sincerely yours,



Acting Comptroller General
of the United States

26. April 30, 1984.--Letter from Acting Administrator Ray Kline, General Services Administration, to Chairman Jack Brooks containing the agency's views on H.R. 5184, the Competition in Contracting Act of 1984.

General
Services
Administration Washington, DC 20405



RECEIVED

APR 30 1984

HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

APR 30 1984

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The General Services Administration (GSA) wishes to submit its views on H.R. 5184, a bill "To revise the procedures for soliciting and evaluating bids and proposals for Government contracts and awarding such contracts using full and open competition."

GSA strongly supports the maximum use of competitive procedures in the procurement of goods and services for the Government. We fully subscribe to the statement in your remarks introducing H.R. 5184 that "[c]ompetition not only provides substantially reduced costs, but also insures that new and innovative products are made available to the Government on a timely basis." To increase the use of competition throughout the civilian sector of the Government, GSA issued during the last fiscal year Federal Procurement Regulations Amendment 230 which places strict limitations on the use of noncompetitive procurement and sets forth strong management controls to ensure implementation of the policy.

We are concerned, however, that H.R. 5184 may not have the desired effect to promote competition and may result in reductions in the ability of the Government to purchase items in the most efficient and cost effective manner. Consequently, for the reasons discussed below, GSA opposes H.R. 5184.

Section 201

Section 201 requires Executive agencies to conduct procurements in accordance with a new Title II of the Office of Federal Procurement Policy Act. The bill does not modify the provisions of the Federal Property and Administrative Services Act (FPASA) or the Armed Services Procurement Act (ASPA). By superimposing its procedures on top of the requirements of those procurement statutes, H.R. 5184 would at the very least create substantial confusion about the interrelation of the provisions of the OFPP Act and the existing statutes. At worst, conflicts among the statutes could render certain provisions of the bill ineffective.

Section 202

The FPASA and the ASPA require that procurements be conducted by formal advertising. Negotiated procurements are authorized only in limited circumstances set forth in each statute. Section 202 grafts onto these procedures new layers of rules and exceptions relating to competition, producing a set of procedures which are extremely complex, if not unworkable. We believe competitive negotiation is an effective method of procurement and that it should be placed on equal footing with formal advertising. To accomplish this, however, amendments must be made to both the FPASA and ASPA.

Section 202 of the bill also establishes an elaborate set of criteria for evaluating competition. There would be three levels of competition: "full and open competition," "practices that are less rigorous than full and open competition," and "practices which are noncompetitive." Accompanying the definitions of each level of competition are a list of situations in which a particular level is appropriate and procedures for executive agencies to follow in those cases where a procurement practice was less than fully competitive. We believe that the detailed definitions, procedures and controls set forth in this section would add only complexity to the procurement system. For example, the levels of competition are defined in terms of "results"--the number of bids or proposals received by a agency for a solicitation. Under these provisions, a contracting officer could determine the validity of pre-solicitation activities only after bids or proposals were received. While the added requirements would certainly create confusion and inefficiencies, it is our opinion that the requirements would not promote competition beyond what has already been accomplished by OFPP Policy Letter 84-2 and FPR Amendment 230.

Section 203

Section 203 of H.R. 5184 establishes requirements for publicizing procurements through notices in the Commerce Business Daily. Similar types of notification requirements are contained in Pub. L. 98-72. We see no benefits in generating an additional set of these requirements in another statute. This adds only complexity and confusion to an already overburdened procurement system.

Section 204

Section 204 would formalize in statute the present role of the Comptroller General in the bid protest system. We believe the current system functions adequately without a statutory framework. Locking the General Accounting Office (GAO) procedures into law would serve only to limit the Comptroller General's ability to adapt the bid protest procedures to fit the changing needs of the procurement community. We also question

the constitutionality of GAO, as an arm of Congress, ruling on entitlement to attorney fees to be paid by executive branch agencies. GSA defers to the views of the Department of Justice in this matter.

The section also would create an additional bid protest forum and procedure for procurements under section 111 of the FPASA, which governs the acquisition and management of automatic data processing (ADP) equipment. Aggrieved bidders would be able to file protests with the General Services Administration Board of Contract Appeals (GSBCA) as well as with GAO. GSBCA would be granted powers similar to those of the Comptroller General in bid protests. H.R. 5184 would also give the GSBCA the unique authority to "suspend, revoke or revise" delegations of procurement authority under section 111 granted by the Administrator of GSA to other agencies. We are aware of no problems in the present system which would justify treating ADP procurement protests differently from other types of procurement protests. In addition, we believe that it would be improper to grant a board of contract appeals the power to modify in any way delegations of authority granted by the head of the agency. The purpose of section 111 is to allow the Administrator of GSA "to coordinate and provide for the economic and efficient purchase, lease and maintenance of automated data processing equipment by Federal agencies." It would be contrary to this goal of a coordinated ADP policy to place the authority to revise or revoke delegations with both the Administrator and the GSBCA. Additionally, we oppose the formalized hearing process for handling protests before GSBCA. Consideration of bid protests is a mechanism for policing the Government's contract award procedures; it is not a forum to resolve the rights and liabilities of parties to a contract.

Section 205

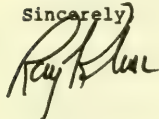
Section 205 specifies that OFPP is to promulgate the regulations implementing the provisions of H.R. 5184. We believe that requiring OFPP to issue modifications to the FAR will create substantial administrative confusion. The authority to issue the FAR is currently vested jointly in the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA) and GSA, while the regulatory authority of OFPP under the OFPP Act is limited to any instance in which DOD, NASA, and GSA are unable to agree on or fail to issue Government-wide regulations in a timely manner. It is our opinion that the present regulatory format is appropriate for all aspects of procurement policy, including those aspects dealing with competition.

We are also concerned about the provision of section 205 which establishes an effective date of October 1, 1984. Because of the vast changes which would be made to the procurement system, a substantial amount of time would be required to develop procedures to implement the requirements of the bill, to write and coordinate regulations and to retrain the Federal work

force. The problems of transition would be further complicated because of the recent implementation of the Government-wide Federal Acquisition Regulation (FAR). As you are aware, all agencies are undergoing a major and critical period of adjustment to the FAR system which became effective on April 1, 1984. Many agencies will have to alter existing aspects of their procurement operations in order to be consistent with FAR provisions. As difficult as it will be to adjust to the FAR, our problems will be greatly enlarged by also having to adjust to a new and comprehensive procurement statute at the same time, particularly when that statute may throw into question many of the concepts and procedures currently embodied in the FAR.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to your Committee.

Sincerely,



Ray Kline
Acting Administrator

27. April 20, 1984.--Letter from Assistant Attorney General Robert A. McConnell, to Chairman Jack Brooks, setting forth the Justice Department's views on H.R. 5184.



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

20 APR 1984

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APR 23 1984

HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 5184, a bill "to revise the procedures for soliciting and evaluating bids and proposals for government contracts using full and open competition, and for other purposes." The Department of Justice opposes enactment of this legislation.

While we join other federal agencies in a commitment to full and open competition where feasible, we believe that section 204, providing for review of procurement procedures by the General Accounting Office, may give rise to substantial constitutional problems in that it abridges the doctrine of separation of powers. Additionally, the provisions of section 204 establish a procedure that permits unnecessary and unwise intrusion into the activities of the executive branch of the government by the legislative branch.

We believe that §204, which would authorize the General Accounting Office (GAO) to take a formal role in the awarding of contracts by the Executive Branch, raises novel and substantial constitutional issues. The GAO is an instrumentality "independent of the executive branch," 31 U.S.C. §702(a), and the Comptroller General is properly considered to be an officer of the Legislative Branch. 1/ As such, he cannot exercise executive or judicial authority without violating the doctrine of separation of powers. Buckley v. Valeo, 424 U.S. 1, 139 (1976).

First, §204(b)(1) authorizes referrals from federal courts, in apparent violation of both Article I and Article III of the Constitution. It is not clear at what stage in a judicial proceeding the court would make the referral or whether GAO's recom-

1/ See generally Willoughby, The General Accounting Office 12 (1927); Smith, The General Accounting Office 61 (1927); The United States Government Manual 42 (1983).

mentation would be an advisory opinion to the court or a final opinion to the parties. In either case, it would appear that GAO would be operating as some kind of adjunct to the judiciary. We are not aware of any authority in the Constitution that permits the Legislative Branch to provide advisory opinions to the Judicial Branch regarding pending cases. Article I authorizes the Legislative Branch to make laws, not to interpret them after they have been enacted. That task is given, under Article III, to the Judicial Branch. Thus, even if judges were inclined to ask for assistance, we believe that it would be unconstitutional for the Legislative Branch to provide it. It would raise equally serious problems under Article III if this section were read to permit GAO to render a final opinion to the parties, thereby usurping the judiciary's function. We therefore oppose the reference to "any court of the United States" in §204(b)(1), and urge its deletion.

Second, §204(b)(2) provides for a stay of the award or performance of a contract pending review by the Comptroller General. While the Comptroller General ultimately makes only a "recommendation," 2/ the impact on the award of contracts by the Executive Branch will be immediate and profound.3/ Only in the most exceptional circumstances can the contract be protected from any delay, §204(b)(2)(D), and even the "express option," §204(c)(1), will take about forty-five days. For the vast majority of contracts, therefore, there will be no statutory limit on the time that GAO may take to make its recommendation.4/

We believe that this provision is unconstitutional. It is one thing to say that Congress may require the Executive to "report" contemplated Executive actions to its committees and delay their execution for a period during which those committees may consider

2/ GAO has for many years issued similar "recommendations" to agencies, 4 C.F.R. Part 21, but it has done so without any express statutory authorization, relying instead on an extension of its authority to settle the accounts of the Government, 31 U.S.C. §3702. Given that there has been considerable discussion over the years questioning whether this settlement authority is properly lodged in a legislative body like GAO, rather than in an executive agency, this bill may be an attempt to give the program a firmer footing.

3/ Given the thousands of contracts awarded each year by the Executive Branch, it may be that the delay engendered by this new process will seriously impinge on the Executive Branch's ability to execute the laws in a timely fashion.

4/ The Comptroller General is supposed, to the "maximum extent practicable," to set up an "inexpensive and expeditious" process. H.R. 5184, §204(c)(1).

legislation to block the Executive action, and quite another to say that Congress may delegate to an entity such as GAO the power effectively to block Executive action outside the legislative process.

Furthermore, if the system ultimately established by this provision sets a 45-day limit during which the Executive Branch could take no final action on a contract, it would constitute more than a "report and wait" provision. It would be unconstitutional because the GAO's action on the contract prior to the end of the 45-day period would, by assertedly permitting the agency to proceed at that point, be taking an action having a legal effect on the rights and obligations of persons outside the Legislative Branch, a result clearly foreclosed by the Supreme Court in INS v. Chadha, 103 S.Ct. 2764 (1983). More importantly, §204(b)(2) clearly contemplates the possibility that with respect to some contracts, the agency will simply be put on permanent "hold" until after GAO has announced its "recommendation." Thus, rather than confronting a statutorily imposed 45-day "waiting period," the agency would be confronted with what would be, analytically, nothing less than a clearly unconstitutional "committee approval" provision, the only difference being that the GAO would play the pivotal role rather than a congressional committee. This section must be deleted because of this constitutional infirmity.

Third, §204(c)(4) purports to give the Comptroller General the authority to make a ruling granting a party the costs of its protest, including attorney fees, which "shall be paid promptly by the executive agency concerned out of funds available for the purpose of the procurement concerned." (Emphasis added). Whether this authority is analyzed as GAO's performing a judicial function which is binding on an executive agency, or as GAO's rendering an administrative decision for the Executive Branch, it is clearly unconstitutional. Buckley v. Valeo, 424 U.S. 1 (1976). The doctrine of separation of powers does not, except in certain very limited circumstances, §/ permit the legislature or any of its parts to bind the Executive Branch except by passage of a law. Nor does it permit the Legislative Branch to execute the law by determining how contracts should be awarded or to adjudicate claims against the Executive Branch. Accordingly, section 204(c)(4) must be deleted in order to remove this substantial concern.

Furthermore, in our view, awarding attorney fees in every case in which the protester prevails is unwise. First, it is contrary to the American rule that attorney fees are not shifted to the losing party, but are borne by each party. While the American rule evasions a shifting of fees in the event of bad faith, no such requirement is made by this proposed legislation. Even the

§/ INS v. Chadha, 103 S.Ct. 2764, 2786 n.20 (1983).

Equal Access to Justice Act, legislation which abrogates the American rule and makes attorney fees against the Government available, requires that the private party demonstrate that the Government's position was not "substantially justified." At a minimum, the legislation should require such a showing.

In addition, the availability of attorney fees in proceedings before the General Accounting Office will undoubtedly encourage litigation which would not otherwise be instituted. The courts have long recognized the wisdom of allowing executive agencies wide latitude in exercising their discretion in procurement situations. The provision for attorney fees seems destined to encourage baseless attacks on the exercise of this discretion.

Apart from the constitutional infirmities evident in section 204, it appears to be intended to create an even greater limit on the traditional broad discretion of executive agencies to conduct procurement activities than is now in existence. We see no reason for legislation with such a goal.

Both before and after contract award, bidders now have the right to institute suit, in either the United States Claims Court or the United States district courts, to seek an injunction preventing the procuring agency from taking further action. In the event a less binding (and perhaps less costly) resolution to such a dispute is desired, bidders now have the right to institute an action before the General Accounting Office which can recommend that the agency take a different course of action. To the extent that the legislation creates for bidders additional substantive rights in the nature of greater competition or fuller agency disclosure, such rights may be enforced under the present law.

Perhaps the most significant intrusion into the procurement process is the bill's provisions affording rights of action before the GAO, before the General Services Board of Contract Appeals and before the courts under the Administrative Procedure Act, to "any interested party." We strongly believe that it would not be in the public interest to allow "any interested party" to disrupt, and possibly halt, a federal procurement of needed goods or services. While the bill does not amplify the meaning of "any interested party," we assume it to include parties other than bidders. In this regard, the bill is a radical departure from existing law, established through a number of years of judicial and administrative experience, which provides that only bidders may cause the substantial disruption to the federal procurement process that attends the filing of a challenge to the agency's action. This law was developed for very good reason. The interruption of normal executive branch functions and the cost to the taxpayer of bid protest litigation cannot be overstated. The courts have consistently recognized the need for substantial discretion in agency officials in the procure-

ment process. All of these considerations have led to the recognition that bid protests have a profound deleterious effect on procurement policy and therefore should be permitted only when the protester has the interest in the procurement of a bidder. Allowing "any interested party" to file an action which, except in unusual circumstances, would require the agency to delay the procurement pending action by the Comptroller General would not be in the best interests of the American people.

Section 204(e), which provides for review of agency procurement decisions under the Administrative Procedure Act, is unnecessary and largely duplicative of the remedies available under the Federal Courts Improvement Act, passed by Congress less than 2 years ago. That Act gave the United States Claims Court jurisdiction to entertain suits for injunctive and other relief filed by bidders who challenge a procurement prior to award. The district courts continue to entertain such suits when they are filed after award. Therefore, providing for APA review is unnecessary and may result in inconsistent legal standards while fostering more litigation.

Section 204(f), providing for jurisdiction in the General Services Board of Contract Appeals over challenges to procurements of automatic data processing equipment, creates a patchwork of remedies benefitting no one. It would create a fourth forum in which a bidder could challenge such a procurement by adding jurisdiction in the Board of Contract Appeals to the previously existing jurisdiction in the Claims Court, the district courts and the General Accounting Office. We know of no reason to enact a law which shows such potential for confusion and disruption absent a compelling need for a fourth forum.

Finally, section 204(b)(2)(A) requires executive agencies to

"submit a complete report (including all relevant documents) on the protested procurement to the Comptroller General within twenty-five working days from the agency's receipt of the notice of such protest."

This resembles prior proposals, historically opposed by this Department, that were intended to give the General Accounting Office unlimited access to executive branch records. 6/ They were opposed

6/ See Letter to the Honorable Jack Brooks, Chairman, House Committee on Government Operations, from Benjamin R. Civiletti, Deputy Attorney General, July 5, 1979 (H.R. 24); Statement of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, Before the House Subcommittee on Legislation and National Security, Committee on Government Operations, June 26, 1978 (H.R. 12171).

because they made no provision for protection of sensitive information from either domestic or foreign activities. Any legislation in this area should permit either the President or the head of the affected agency to exempt records involving financial transactions which relate to sensitive foreign intelligence or foreign counter-intelligence activities; financial transactions taken pursuant to section 8(b) of the Central Intelligence Agency Act of 1949, as amended; and information the disclosure of which could reasonably be expected to expose a sensitive investigation or investigative technique, or endanger the safety of past or present government agents, informants, other cooperating individuals or their families. See, e.g., 31 U.S.C. §3524(c), (d) (1982).

In sum, we believe that section 204 is unconstitutional, unnecessary and potentially damaging to the interests of the United States. In the event that Congress determines that, in an effort to foster more competition, agencies should follow certain procedures to accomplish that end, adequate remedies to ensure compliance are presently available.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General

SIGNED

By: _____

C. Marshall Cain
Acting Assistant Attorney General
Pursuant to 28 C.F.R. §0.152

28. April 6, 1981.--Letter from Attorney General William French Smith to the Senate Judiciary Committee responding to the committee's request that the Department reconsider its decision not to defend the constitutionality of an Act of Congress in the case of League of Women Voters v. FCC.



Office of the Attorney General

Washington, D.C. 20530

April 6, 1981

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Honorable Joseph R. Biden, Jr.
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Biden:

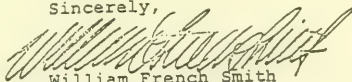
I am pleased to respond to your letter of February 3, 1981, requesting that I reconsider the decision of the Department of Justice not to defend the constitutionality of 47 U.S.C. § 399(a) in the case of League of Women Voters v. FCC, No. 80-5333 (9th Circuit). Please forgive the delay in responding, but we have undertaken a thorough review of the question. I have determined that the Department will participate in the litigation and defend the statute.

The Department appropriately refuses to defend an Act of Congress only in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid. In my view, the Department has the duty to defend an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.

The prior decision not to defend § 399(a) was made by virtue of the conclusion that no reasonable defense of the constitutionality of this provision as a whole could be made. Under applicable Supreme Court precedent, however, even a statute that could have some impermissible applications will not be declared unconstitutional as a whole unless the provision is substantially overbroad and no limiting construction of the language of the statute is possible. Here, for example, the statute's application to political endorsements by government-owned broadcasters might well be held by a court to be constitutional. In that event, the fact that the statute permissibly could be applied in some instances may be sufficient to preclude a finding that the provision as a whole is unconstitutional.

Accordingly, we will advise the Ninth Circuit of our position and request that the case be remanded to the District Court to allow us to present our defense.

Sincerely,

A handwritten signature in cursive script, appearing to read "William French Smith".

William French Smith
Attorney General

29. July 30, 1980.--Letter from Attorney General Benjamin R. Civiletti to Senator Max Baucus (excerpted from hearings entitled "Department of Justice Authorization and Oversight, 1981," March-May 1980, Senate Committee on the Judiciary.)

DEPARTMENT OF JUSTICE
AUTHORIZATION AND OVERSIGHT, 1981

HEARINGS
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-SIXTH CONGRESS
SECOND SESSION
ON
DEPARTMENT OF JUSTICE
AUTHORIZATION AND OVERSIGHT, 1981

MARCH 11, 12, 13, 17, 19, 20, 27, APRIL 2, 3, 16, 23, 28, 30 AND
MAY 1, 1980

Serial No. 96-63

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Office of the Attorney General
Washington, D. C. 20530

July 30, 1980

Honorable Max Baucus
United States Senate
Chairman
Subcommittee on Limitations of
Contracted and Delegated Authority
1107 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

In your letter of June 25, 1980, you asked that I answer eleven questions posed by you concerning the legal "authority" supporting "the Justice Department's assertion that it can deny the validity of Acts of Congress." I am pleased to respond. I have taken the liberty of setting these eleven questions out verbatim so the context in which my answers are given will be clear. My answers follow several preliminary observations about the form of the questions asked and the general nature of the Department's "assertion" in this matter.

The Attorney General has a duty to defend and enforce the Acts of Congress. He also has a duty to defend and enforce the Constitution. If he is to perform these duties faithfully, he must exercise conscientious judgment. He must examine the Acts of Congress and the Constitution and determine what they require of him; and if he finds in a given case that there is a conflict between the requirements of the one and the requirements of the other, he must acknowledge his dilemma and decide how to deal with it. That task is inescapably his.

I concur fully in the view expressed by nearly all of my predecessors that when the Attorney General is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress. That view is supported by compelling constitutional considerations. Within their respective spheres of action the three branches of Government can and do exercise judgment with respect to constitutional questions, and the Judicial Branch is ordinarily in a position to protect both the Government and the citizenry from unconstitutional action, legislative and executive; but only

the Executive Branch can execute the statutes of the United States. For that reason alone, if executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system.

At the same time, I believe that if Congress were to enact a law requiring, for example, that the Attorney General arrest and imprison all members of the opposition party without trial, the Attorney General could lawfully decline to enforce such a law; and he could lawfully decline to defend it in court. Indeed, he would be untrue to his office if he were to do otherwise. This is not because he has authority to "deny the validity of Acts of Congress." It is because everything in our constitutional jurisprudence inescapably establishes that neither he nor any other executive officer can be given authority to enforce such a law. The "assertion" of the Department of Justice is nothing more, nor less, than this. */

I have one further observation. In your letter you state that your request "does not include those situations where the Acts themselves touch on constitutional separation of powers between Executive and Legislative Branches" Since almost all of the legal authority dealing with this question, from the trial of Andrew Johnson to the arguments of Attorney General Levi in Buckley v. Valeo, 424 U.S. 1 (1976), deal with separation of powers issues, your limitation is stringent. I will not discuss all the pertinent authorities if you will permit me to note that in this field the historical

*/ I note that an analogous situation is presented where an individual subject to a court injunction believes that injunction to be unconstitutional or legally invalid. The well-established rule is that such an injunction must be obeyed until it is dissolved or modified on appeal in order to preserve the integrity of the judicial process. Walker v. City of Birmingham, 388 U.S. 307 (1967). The Court in Walker, however, was careful to emphasize that it did not have before it a case in which "the injunction was transparently invalid." Id., at 315. If an Act of Congress directs or authorizes the Executive to take action which is "transparently invalid" when viewed in light of established constitutional law, I believe it is the Executive's constitutional duty to decline to execute that power.

predominance of separation of powers issues is no accident. I have said that the Executive can rarely defy an Act of Congress without upsetting the equilibrium established within our constitutional system; but if that equilibrium has already been placed in jeopardy by the Act of Congress itself, the case is much more likely to fall within that narrow class.

The traditional debate over the nature and extent of the President's supervisory authority as Chief Executive provides a good illustration of the phenomenon to which I have just referred. From time to time Congress has attempted to limit the President's power to remove, and thereby control, the officers of the United States. Some of these attempts have been consistent with the Constitution; others have not. In every one of these instances, however, it was the Act of Congress itself that altered the balance of forces between the Executive and Legislative Branches; and if the Executive had invariably honored the Act, our constitutional system would have been changed by fait accompli. Accordingly, in some of the cases in which the constitutionality of the Act was in doubt, the Executive determined that it could best preserve our constitutional system by refusing to honor the limitation imposed by the Act, thereby creating, through opposition, an opportunity for change and correction that would not have existed had the Executive acquiesced. See Myers v. United States, 272 U.S. 52 (1926). Inter-branch disputes over other separation-of-powers issues can follow a similar course.

I now turn to your specific questions.

Question 1: What is the specific authority (if any) deriving from English constitutional history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

As I have suggested, the Department's "assertion" depends entirely upon the proposition that there are fundamental limitations on the authority of the Legislative and Executive Branches of our Government. This, in fact, is the central legal principle in our constitutional system -- our system of "limited" government -- and it is a principle that the English have rejected. Accordingly, English constitutional history is important for our purposes, not because it supports my view that in a system of "limited" government there are powers and duties that cannot be imposed upon executive

officers, but because it illustrates how constitutional government can develop towards a radically different model -- a model in which there is no fundamental limitation upon legislative power. It is true that there are early English cases that I could cite in my behalf. I am reminded in particular of Coke's judgment in Calvin's Case, 7 Co. Rep. 1 (immutable natural law prevents Parliament from separating a subject from the protection of his king). But even though these early precedents enjoyed some vitality on this side of the Atlantic as late as the time of the American Revolution (consider, for example, James Otis' classic attack on the writs of assistance, February 24, 1761, printed in Commager, Documents of American History 45 (5th ed. 1949)), they did not carry the day in their own country.

I should add that I consider the seventeenth century dispute between Parliament and the Stuart kings over the so-called "dispensing power" to be directly relevant to the questions you have raised. The history of that dispute was well-known to the Framers of the Constitution, and it is clear that they intended to deny our President any discretionary power of the sort that the Stuarts claimed. We must remember, however, that it was largely as a result of Parliament's victory in that matter that the English came to abandon any notion that "fundamental law" limited the powers of the legislative sovereign. This is the very notion upon which our Constitution, and the Department's view of this question, depends. In our system of limited government, unlike the English system, there are some things that the legislature and the officers of the Government cannot lawfully do.

Question 2: What is the specific authority (if any) deriving from the Constitutional Convention and other expressions of the Framers which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The available evidence concerning the intentions of the Framers lends no specific support to the proposition that the Executive has a constitutional privilege to disregard statutes that are deemed by it to be inconsistent with the Constitution. The Framers gave the President a veto for the purpose, among others, of enabling him to defend his constitutional position. They also provided that his veto could be overridden by extraordinary majority in both Houses. That being so, an argument can be made that the Framers assumed

that the President would not be free to ignore, on constitutional grounds or otherwise, an Act of Congress that he had been unwilling to veto */ or had been enacted over his veto.

At the same time, I believe that there is relatively little direct evidence of what the Framers thought, or might have thought, about the Executive's obligations with regard to Acts of Congress that were transparently inconsistent with the Constitution; and, indeed, the question remained open for some time after the Constitution was adopted. President Jefferson, for example, writing of the Alien and Sedition Acts in 1804, concluded that each Branch had power to exercise independent judgment on constitutional questions and that this was an important element in the system of checks and balances:

"The judges believing the [Sedition law] constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. The instrument meant that its coordinate branches should be checks on each other." [8 Writings of Thomas Jefferson 310 (1897).]

President Jefferson's view was not to prevail, although other early Presidents, including Andrew Jackson, were to express similar sentiments from time to time.

As I have said, I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress. At the same time, I think that in rare cases the Executive's duty to the constitutional system may require that a statute be challenged; and if that happens, executive action in defiance of the statute is authorized and lawful if the statute is unconstitutional. That brings me to your next question.

*/ The President's failure to veto an unconstitutional Act of Congress does not in itself estop the Executive from challenging the Act in court at a future date, nor does it cure the constitutional defect where the question is one of separation of powers. See Myers v. United States, 272 U.S. 52 (1926); National League of Cities v. Usery, 426 U.S. 833, 841 n.12 (1976).

Question 3: What is the specific authority (if any) deriving from Supreme Court or other judicial opinions which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

In Myers v. United States, 272 U.S. 52 (1926), the Supreme Court was asked to decide whether the President had acted lawfully in removing a postmaster from office in contravention of an Act of Congress. The Act provided that postmasters were not to be removed by the President without the advice and consent of the Senate. The case involved a claim for back salary filed by the heirs of the postmaster who had been removed. The action was brought in the Court of Claims under a statute that gives that court jurisdiction to hear cases not sounding in tort arising out of conduct by executive officers alleged to be unlawful under the Constitution or Acts of Congress.

When the case came before the Supreme Court, the Solicitor General, appearing for the United State, assailed the attempt to limit the removal power. He argued that the statute imposed an unconstitutional burden upon the President's supervisory authority over subordinate officers in the Executive Branch. Senator Pepper made an *amicus curiae* appearance and argued that the statute was constitutional. The Court ruled that the statute was unconstitutional. More to the point, the Court ruled that the President's action in defiance of the statute had been lawful. It gave rise to no actionable claim for damages under the Constitution or any Act of Congress in the Court of Claims.

In my view, Myers is very nearly decisive of the issue you have raised. Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts: He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is unconstitutional from the start.

I wish to add a cautionary note. The President has no "dispensing power." If he or his subordinates, acting at his direction, defy an Act of Congress, their action will be condemned if the Act is ultimately upheld. Their own views regarding the legality or desirability of the statute do not suspend its operation and do not immunize

their conduct from judicial control. They may not lawfully defy an Act of Congress if the Act is constitutional. This was the teaching of a near sequel of Myers, Humphrey's Executor v. United States, 295 U.S. 602 (1935); and it is a proposition that was implicit in many prior holdings. In those rare instances in which the Executive may lawfully act in contravention of a statute, it is the Constitution that dispenses with the operation of the statute. The Executive cannot.

Question 4: What is the specific authority (if any) deriving from opinions of the Attorneys General which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The formal opinions of my predecessors in this Office establish with clarity the general principles upon which this Department continues to rely in dealing with real or apparent conflicts between Acts of Congress and the Constitution. See, e.g., 40 Op. Att'y Gen. 158, 160, and opinions cited therein. As I have already said, I support those opinions fully. All of them emphasize our paramount obligation to the Acts of Congress. None of them concludes that the Executive must enforce and defend every Act of Congress in every conceivable case, the requirements of the Constitution notwithstanding.

Question 5: What is the specific authority (if any) deriving from express language in statutes or their legislative history which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The statutes that define the Office of the Attorney General require him to render opinions upon questions of law, and they require him to conduct litigation in which the United States is interested. None of the statutes either requires or forbids him to inquire into the constitutionality of statutes. */ As I have said, the tradi-

*/ Quite apart from the provisions of any statute prescribing the duties or the authority of the Attorney General, the Constitution itself provides that the President "may require the Opinion in Writing, of the principal Officer in each of the executive Departments upon any subject relating to the Duties of their respective Offices." U.S. Const. Art. II, § 2, clause 1.

tional opinion has been that the Attorney General, in the due performance of his constitutional function as an Officer of the United States, must ordinarily defend the Acts of Congress. As I have said, I subscribe fully that position.

Question 6: What is the specific authority (if any) deriving from historic practice prior to the current Administration which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

Marbury v. Madison, 1 Cranch 137 (1803), was probably the first case in which the Executive made no effort to defend an Act of Congress on a constitutional point. President Jefferson was strongly of the view that Congress had no power to give the Supreme Court (or any other court) authority to control executive officers through the issuance of writs of mandamus. See 1 Warren, The Supreme Court in United States History 232, 242-43 (1922). When Mr. Marbury and the other "midnight judges" initiated an original action in the Supreme Court to compel delivery of their commissions, President Jefferson's Attorney General, Levi Lincoln, made no appearance in the case except as a reluctant witness. See 1 Cranch 143-44. No attorney appeared on behalf of Secretary Madison. The Court ultimately resolved the case by agreeing and disagreeing with President Jefferson. The Court held that the relevant statute was unconstitutional to the extent that it attempted to give the Supreme Court power to issue writs of mandamus against executive officers, but that there was no general principle of law that would prevent Congress from giving that power to the lower courts.

A second significant historical incident involving a refusal by the Executive to execute or defend the Acts of Congress on constitutional grounds arose during the Administration of Andrew Johnson. In defiance of the Tenure in Office Act, which he deemed to be unconstitutional, President Johnson removed his Secretary of War. This action provided the legal basis for one of the charges that was lodged against him by his opponents in the House; and during his subsequent trial in the Senate, the arguments offered by counsel on both sides provided an illuminating

discussion of the responsibilities of the Executive in our constitutional system. See 2 Trial of Andrew Johnson 200 (Washington 1868). President Johnson was acquitted . . . by one vote.

I will mention a third incident that illustrates an interesting variation on the historical practice. In the midst of World War II, as a result of the work of the House Committee on Un-American Activities, Congress provided, in a deficiency appropriations act, that no salary or compensation could be paid to certain named government employees. These individuals had been branded in the House as "irresponsible, unrepresentative, crackpot, radical bureaucrats." The Executive responded to the statute by taking two courses at once. The Executive enforced the letter of the statute (by not paying the salary of the employees in question), but joined with the employees in a legal attack upon the constitutionality of the relevant provision. When the case came before the Supreme Court, an attorney was permitted to appear on behalf of Congress, as amicus curiae, to defend the statute against the combined assault. The Court struck the relevant provision, holding that it was a bill of attainder, and allowed the employees to recover. United States v. Lovett, 328 U.S. 303 (1946).

Altogether, there have been very few occasions in our history when Presidents or Attorneys General have undertaken to defy, or to refuse to defend, an Act of Congress. Most of the relevant cases are cited either in the foregoing discussion or in the answers that the Senate Legal Counsel has provided to you in response to these same questions.

Question 7: What is the specific support (if any) expressed in any scholarly article or book for the Justice Department's assertion that it can deny the validity of Acts of Congress?

A helpful scholarly discussion of this problem, together with citations to other works, may be found in Edward Corwin's book on the Presidency. Taking full advantage of his scholarly prerogative, Corwin ignores the teaching and, indeed, the holding of Myers and concludes that the President, even though he may doubt the constitutionality of a statute, "must promote its enforcement by all the powers



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constitutionally at his disposal unless and until enforcement is prevented by regular judicial process." 2 E. Corwin, The President, Office and Powers, 1887-1957, 66 (4th rev'd ed. 1957).

Question 8: What is the specific authority (if any) deriving from ethical pronouncements which supports the Justice Department's assertion that it can deny the validity of Acts of Congress?

The "ethical" obligations that devolve upon the Attorney General as a member of the legal profession cannot enlarge or contract his duties as an Officer of the United States. There is nothing in my obligation to my profession or to the courts that prevents me from discharging my duty either to defend the Acts of Congress or to question them in the rare cases in which that is appropriate.

Question 9: What specific instances are there in which a court or bar association has expressly asserted an ethical duty for government litigators to inquire into the validity of Acts of Congress?

I know of no decision by a court or a bar association that expressly asserts that government litigators have an ethical duty either to inquire into the validity of Acts of Congress or to defend them.

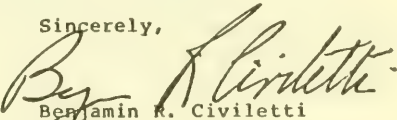
Question 10: Has the Justice Department ever sought from Congress legislation to deal with any asserted ethical problem in litigation concerning the validity of Acts of Congress?

No.

Question 11: Has there been any relevant change in the ethical rules in the past few years, since the Justice Department has first begun denying the validity of Acts of Congress?

I know of no recent change in any ethical rule that relates to this problem. Your question assumes that the Justice Department has some new policy in this field. From what I have said in response to your questions, and from the historical examples I have given, I hope it is clear that we have no new policy. Our policy is an old one.

Sincerely,


Benjamin R. Civiletti
Attorney General

30. October 11, 1979.--Letter from Attorney General Benjamin R. Civiletti to Speaker of the House Thomas P. O'Neill, Jr., informing the House of Representatives that the Department will not defend the constitutionality of a statute in the case of League of Women Voters v. FCC.



Office of the Attorney General
Washington, D. C. 20530

October 11, 1979

True-

Honorable Thomas P. O'Neill
Speaker of the House of
Representatives
Washington, D. C. 20515

2628

Dear Mr. Speaker:

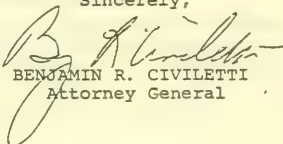
In League of Women Voters of California, et al. v. Federal Communications Commission (C.D. Cal., No. CV 79-1562-MML(PX)), the plaintiffs challenge, on First and Fifth Amendment grounds, the constitutionality of Section 399(a) of the Public Broadcasting Act of 1967, 47 U.S.C. §399(a), which prohibits all public broadcasting stations from editorializing and supporting or opposing political candidates. I wish to inform the House of Representatives that the United States will not defend the constitutionality of the statute.

After careful consideration, we have concluded that Section 399(a) violates the First Amendment guarantees of freedom of speech and freedom of the press by restricting the ability of public broadcasting stations to comment on matters of public interest. While not every restriction on expression is necessarily unconstitutional, such restrictions must serve some compelling state interest. We have not been able to identify any compelling governmental interest served by Section 399(a) which would justify the statute's prior restraint on speech. Furthermore, even if the Department of Justice could fashion an argument that the statute serves a compelling government interest, the statute would still be constitutionally defective on grounds of overbreadth since public broadcasting stations receiving no federal funds are covered. Finally, we have concluded that there are less restrictive means to achieve the suggested purposes of the statute.

The Department of Justice is, of course, fully mindful of its duty to support the laws enacted by Congress. Here, however, the Department has determined, after careful study and deliberation, that reasonable arguments cannot be advanced to defend the challenged statute. The Federal Communications Commission has informed us that it agrees that the statute cannot be defended successfully in its present form.

The Department has filed an Answer to Plaintiffs' Complaint to protect your interests should you decide to defend this suit, and the Court has established a briefing schedule. If the Department can be of further assistance to you in explicating the reasons for declining to defend this case or if you or your staff believe it would be helpful to discuss the options that the House of Representatives may wish to pursue, Thomas S. Martin, Deputy Assistant Attorney General, Civil Division, will be pleased to discuss the matter further. He can be reached at 633-3309.

Sincerely,



BENJAMIN R. CIVILETTI
Attorney General

31. January 15, 1979.--Portion of S. 5 (96th Congress), Federal Acquisition Reform Act, pertaining to bid protest function

96TH CONGRESS
1ST SESSION

S. 5

To provide policies, methods, and criteria for the acquisition of property and services by executive agencies.

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 1979

Mr. CHILES introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To provide policies, methods, and criteria for the acquisition of property and services by executive agencies.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 *SHORT TITLE; TABLE OF CONTENTS*

4 SECTION 1. (a) SHORT TITLE.—This Act may be cited
5 as the "Federal Acquisition Reform Act".

6 (b) TABLE OF CONTENTS.—

Sec. 1. Short title; table of contents.

Sec. 2. Declaration of policy.

Sec. 3. Definitions.

TITLE I—REGULATORY GUIDANCE

- Sec. 101. Acquisition methods.
- Sec. 102. Regulatory compliance.
- Sec. 103. Contracting Officers Compliance Code; Enforcement.

TITLE II—ACQUISITION BY COMPETITIVE SEALED BIDS

- Sec. 201. Criteria for use.
- Sec. 202. Invitation for sealed bids.
- Sec. 203. Evaluation, award, and notifications.

TITLE III—ACQUISITION BY COMPETITIVE NEGOTIATION

- Sec. 301. Criteria for use.
- Sec. 302. Solicitations.
- Sec. 303. Evaluation, award, and notifications.
- Sec. 304. Noncompetitive exceptions.
- Sec. 305. Price and cost data and analysis.
- Sec. 306. Access to records by Executive Agencies and the Comptroller General.

TITLE IV—ACQUISITION BY SIMPLIFIED SMALL PURCHASE METHOD

- Sec. 401. Criterion for use.
- Sec. 402. Solicitations and awards.

TITLE V—GENERAL PROVISIONS

- Sec. 501. Contract types.
- Sec. 502. Warranty against contingent fees.
- Sec. 503. Cancellations and rejections.
- Sec. 504. Multiyear contracts.
- Sec. 505. Advance, partial, and progress payments.
- Sec. 506. Remission of liquidated damages.
- Sec. 507. Determination and findings.
- Sec. 508. Enforcement and penalty.
- Sec. 509. Government surveillance requirements.
- Sec. 510. Maintenance of regulations.
- Sec. 511. Payment of funds due.
- Sec. 512. Publication of intent.
- Sec. 513. Revisions of thresholds.
- Sec. 514. Sunset for specifications.
- Sec. 515. Minority business participation.
- Sec. 516. Limitation on contract claims.

TITLE VI—DELEGATION OF AUTHORITY

- Sec. 601. Delegation within an executive agency.
- Sec. 602. Joint acquisitions.

TITLE VII—PROTESTS

- Sec. 701. Purpose.

- Sec. 702. Jurisdiction.
- Sec. 703. Proceedings.
- Sec. 704. General provisions.
- Sec. 705. Judicial review.

TITLE VIII—APPLICABILITY OF SUBSEQUENT LAWS

- Sec. 801. Applicability.
- Sec. 802. Separability.

TITLE IX—AMENDMENTS AND REPEALS

- Sec. 901. Amendments.
- Sec. 902. Repeals.

19

TITLE VII—PROTESTS

20

PURPOSE

21

SEC. 701. Under the authority contained in the Budget
22 and Accounting Act, 1921, as amended, protests shall be de-
23 cided in the General Accounting Office if filed with that
24 Office in accordance with this title. For purposes of this title,
25 the term "protest" means a challenge to a solicitation, or to a

1 the award or proposed award of any contract to be financed
2 by appropriated funds for the acquisition by an agency of
3 property or services or for any sale or lease by an agency and
4 the term "agency" means an executive department as de-
5 fined by section 101 of title 5, United States Code; an inde-
6 pendent establishment as defined by section 104 of title 5,
7 United States Code (except that it shall not include the Gen-
8 eral Accounting Office); a military department as defined by
9 section 102 of title 5, United States Code; the United States
10 Postal Service; a wholly owned Government corporation as
11 defined by section 846 of title 31, United States Code (but
12 does not include the Tennessee Valley Authority or the Bon-
13 neville Power Administration); and any department or
14 agency or other activity of the Federal Government whose
15 accounts are subject to settlement by the Comptroller Gener-
16 al of the United States pursuant to the Budget and Account-
17 ing Act, 1921, as amended.

18 JURISDICTION

19 SEC. 702. (a) In accordance with the procedures issued
20 pursuant to section 704, the Comptroller General shall have
21 authority to decide any protest submitted by an interested
22 party or referred by any agency or Federal instrumentality.
23 An interested party is a firm or an individual whose direct
24 economic interest would be affected as contractor or subcon-
25 tractor by the award or nonaward of the contract.

1 (b) No contract shall be awarded after the contracting
2 activity has received notice of a protest to the Comptroller
3 General while the matter is pending before him: *Provided,*
4 *however,* That the head of an agency may authorize the
5 award of a contract notwithstanding such protest, upon a
6 written finding that the interest of the United States will not
7 permit awaiting the decision of the Comptroller General: *And*
8 *provided further,* That the Comptroller is advised of such
9 finding prior to the award of the contract.

10 (c) With respect to any solicitation, proposed award, or
11 award of contract protested to him in accordance with this
12 title, the Comptroller General is authorized to declare wheth-
13 er such solicitation, proposed award, or award comports with
14 law and regulation.

15 PROCEEDINGS

16 SEC. 703. (a) To the maximum extent practicable, the
17 Comptroller General shall provide for the inexpensive, infor-
18 mal, and expeditious resolution of protests.

19 (b) Each decision of the Comptroller General shall be
20 signed by him or his delegee and shall be issued under the
21 authority of the Comptroller General to settle the accounts of
22 the Government under the Budget and Accounting Act,
23 1921, as amended. A copy of the decision shall be furnished
24 to the interested parties and the executive agency or agencies
25 involved.

1 (c) There shall be no ex parte proceeding in protests
2 before the Comptroller General or his representative, except
3 that this subsection shall not be deemed to preclude informal
4 contacts with the parties for procedural purposes.

5 (d) The Comptroller General is authorized to dismiss
6 any protest he determines to be frivolous or which, on its
7 face, does not state a valid basis for protest.

8 (e) Where the Comptroller General has declared that a
9 solicitation, proposed award, or award of a contract does not
10 comport with law or regulation, he may further declare the
11 entitlement of an appropriate party to bid and proposal prep-
12 aration costs. In such cases the Comptroller General may
13 remand the matter to the agency involved for a determination
14 as to the amount of such costs. Declarations of entitlement to
15 monetary awards shall be paid promptly by the agency con-
16 cerned out of funds available for the purpose.

17 GENERAL PROVISIONS

18 SEC. 704. The Comptroller General shall issue such
19 procedures, not inconsistent with this title, as may be neces-
20 sary in the execution of the protest decision function. He may
21 delegate his authority to other officers or employees of the
22 General Accounting Office.

23 JUDICIAL REVIEW

24 SEC. 705. Any person adversely affected or aggrieved
25 by the action, or the failure to act, of an agency, or of the

1 Comptroller General, with respect to a solicitation or award
2 hereunder may obtain judicial review thereof to the extent
3 provided by sections 702 through 706 of title 5, United
4 States Code, including determinations necessary to resolve
5 disputed material facts or when otherwise appropriate.

32. July 13, 1978.--Portion of S. 1264 (95th Congress), as reported by Mr. Chiles and referred to the Committee on Armed Services, pertaining to bid protest function.

95TH CONGRESS
2d Session

S. 1264

[Report No. 95-715]

IN THE SENATE OF THE UNITED STATES

APRIL 6 (legislative day, FEBRUARY 21), 1977

Mr. CHILES (for himself, Mr. ROTH, Mr. HEINZ, Mr. RIEGLE, and Mr. PACKWOOD) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

MARCH 22 (legislative day, FEBRUARY 6), 1978

Reported by Mr. CHILES, with and amendment

JULY 13 (legislative day, MAY 17), 1978

Referred to the Committee on Armed Services, by unanimous consent

(Strike out all after the enacting clause and insert the part printed in *italic*)

A BILL

To provide policies, methods, and criteria for the acquisition of property and services by executive agencies.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 ~~SHORT TITLE; TABLE OF CONTENTS~~

4 ~~SECTION 1. (a) SHORT TITLE. This Act may be cited~~
5 ~~as the "Federal Acquisition Act of 1977".~~

6 ~~(b) TABLE OF CONTENTS.—~~

~~Sec. 1. Short title; table of contents.~~

~~Sec. 2. Declaration of policy.~~

~~Sec. 3. Definitions.~~

~~TITLE I ACQUISITION METHODS AND REGULATORY GUIDANCE~~

~~Sec. 101. Acquisition methods.~~

~~Sec. 102. Regulatory compliance.~~

~~TABLE OF CONTENTS Continued~~~~TITLE II ACQUISITION BY COMPETITIVE SEALED BIDS~~

- ~~Sec. 201. Criteria for use.~~
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- ~~Sec. 203. Evaluation, award, and notifications.~~

~~TITLE III ACQUISITION BY COMPETITIVE
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- ~~Sec. 301. Criteria for use.~~
- ~~Sec. 302. Solicitations.~~
- ~~Sec. 303. Evaluation, award, and notifications.~~
- ~~Sec. 304. Single source exceptions.~~
- ~~Sec. 305. Price analysis and cost data.~~
- ~~Sec. 306. Access to records.~~

~~TITLE IV ACQUISITION BY COMPETITIVE SMALL
PURCHASE PROCEDURES~~

- ~~Sec. 401. Criteria for use.~~
- ~~Sec. 402. Solicitations and awards.~~

~~TITLE V GENERAL PROVISIONS~~

- ~~Sec. 501. Contract types.~~
- ~~Sec. 502. Warranty against contingent fees.~~
- ~~Sec. 503. Cancellations and rejections.~~
- ~~Sec. 504. Multiyear contracts.~~
- ~~Sec. 505. Advance, partial, and progress payments.~~
- ~~Sec. 506. Remission of liquidated damages.~~
- ~~Sec. 507. Determinations and findings.~~
- ~~Sec. 508. Competitive bidding information.~~
- ~~Sec. 509. Government surveillance requirements.~~
- ~~Sec. 510. Maintenance of regulations.~~

~~TITLE VI DELEGATION OF AUTHORITY~~

- ~~Sec. 601. Delegation within an executive agency.~~
- ~~Sec. 602. Joint acquisitions.~~

~~TITLE VII PROTESTS~~

- ~~Sec. 701. Purpose.~~
- ~~Sec. 702. Jurisdiction.~~
- ~~Sec. 703. Proceedings.~~
- ~~Sec. 704. General provisions.~~

~~TITLE VIII AMENDMENTS AND REPEALS~~

- ~~Sec. 801. Amendments.~~
- ~~Sec. 802. Repeals.~~

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14 *SECTION 1. (a) SHORT TITLE.—This Act may be cited*
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- Sec. 901. Amendments.*
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TITLE VII—PROTESTS**PURPOSE**

SEC. 701. Under the authority contained in the Budget and Accounting Act, 1921, as amended, protests shall be decided in the General Accounting Office if filed with that Office in accordance with this title. For purposes of this title, the term "protest" means a challenge to a solicitation, or to the award or proposed award of any contract to be financed by appropriated funds for the acquisition of property or services or for any sale or lease by the Government and the term "agency" means an executive department as defined by section 101 of title 5, United States Code; an independent establishment as defined by section 104 of title 5, United States Code (except that it shall not include the General Accounting Office); a military department as defined by section 102 of title 5, United States Code; the United States Postal Service; a wholly owned Government corporation as defined by section 846 of title 31, United States Code (but does not include the Tennessee Valley Authority or the Bonneville Power Administration); and any department or agency or other activity of the Federal Government whose accounts are subject to settlement by the Comptroller Gen-

1 *eral of the United States pursuant to the Budget and Ac-*
2 *counting Act, 1921, as amended.*

3 *JURISDICTION*

4 *SEC. 702. (a) In accordance with the procedures issued*
5 *pursuant to section 704, the Comptroller General shall have*
6 *authority to decide any protest submitted by an interested*
7 *party or referred by any agency or Federal instrumentality.*
8 *An interested party is a firm or an individual whose direct*
9 *economic interest would be affected as contractor or subcon-*
10 *tractor by the award or nonaward of the contract.*

11 *(b) No contract shall be awarded after the contracting*
12 *activity has received notice of a protest to the Comptroller*
13 *General while the matter is pending before him: Provided,*
14 *however, That the head of an executive agency may authorize*
15 *the award of a contract notwithstanding such protest, upon a*
16 *written finding that the interest of the United States will not*
17 *permit awaiting the decision of the Comptroller General:*
18 *And provided further, That the Comptroller is advised of*
19 *such finding prior to the award of the contract.*

20 *(c) With respect to any solicitation, proposed award,*
21 *or award of contract protested to him in accordance with*
22 *this title, the Comptroller General is authorized to declare*

1 *whether such solicitation, proposed award, or award com-*
2 *ports with law and regulation.*

3 *PROCEEDINGS*

4 *SEC. 703. (a) To the maximum extent practicable, the*
5 *Comptroller General shall provide for the inexpensive, in-*
6 *formal, and expeditious resolution of protests.*

7 *(b) Each decision of the Comptroller General shall be*
8 *signed by him or his delegee and shall be issued under the*
9 *authority of the Comptroller General to settle the accounts of*
10 *the Government under the Budget and Accounting Act,*
11 *1921, as amended. A copy of the decision shall be furnished*
12 *to the interested parties and the executive agency or agencies*
13 *involved.*

14 *(c) There shall be no ex parte proceeding in protests*
15 *before the Comptroller General or his representative, except*
16 *that this subsection shall not be deemed to preclude informal*
17 *contacts with the parties for procedural purposes.*

18 *(d) The Comptroller General is authorized to dismiss*
19 *any protest he determines to be frivolous or which, on its*
20 *face, does not state a valid basis for protest.*

21 *(e) Where the Comptroller General has declared that*
22 *a solicitation, proposed award, or award of a contract does*
23 *not comport with law or regulation, he may further declare*
24 *the entitlement of an appropriate party to bid and proposal*
25 *preparation costs. In such cases the Comptroller General*

1 may remand the matter to the executive agency involved for
2 an initial determination as to the amount of such costs. Dec-
3 larations of entitlement to monetary awards shall be paid
4 promptly by the executive agency concerned out of funds
5 available for the purpose.

6 GENERAL PROVISIONS

7 SEC. 704. The Comptroller General shall issue such pro-
8 cedures, not inconsistent with this title, as may be necessary
9 in the execution of the protest decision function. He may
10 delegate his authority to other officers or employees of the
11 General Accounting Office.

12 JUDICIAL REVIEW

13 SEC. 705. Any person adversely affected or aggrieved
14 by the action, or the failure to act, of an executive agency,
15 or of the Comptroller General, in respect of a solicitation or
16 award hereunder may obtain judicial review thereof to the
17 extent provided by sections 702 through 706 of title 5, United
18 States Code, including determinations necessary to resolve
19 disputed material facts or when otherwise appropriate.

33. July 22, 1977.--Letter from Roy S. Mitchell, American Bar Association, to Chairman Lawton M. Chiles, Senate Subcommittee on Federal Spending Practices and Open Government, setting forth the opinion of the Public Contract Law Section on S. 1264, the Federal Acquisition Act of 1977.

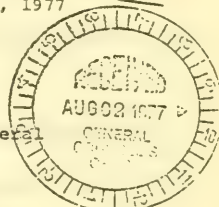
AMERICAN BAR ASSOCIATION

SECTION OF
PUBLIC CONTRACT
LAW



1155 EAST 60TH ST., CHICAGO, ILLINOIS 60637 T (312) 947-3863

July 22, 1977



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Senator Lawton M. Chiles
Chairman of the Senate Subcommittee on Federal
Spending Practices and Open Government
Room 443, Russell Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Chiles:

This letter will serve as an addendum to my testimony of July 22, 1977 and sets forth the opinion of the Public Contract Law Section that Title VII of S. 1264, the Federal Acquisition Act of 1977, is within the legislative power of Congress. Constitutional questions have been raised about the power of Congress to vest authority in the Comptroller General to render binding decisions which hold that (1) solicitations, proposed awards, and awards do not comport with law or regulation, (2) that a contract so awarded shall be terminated for the convenience of the Government, and (3) that a protestor is entitled to bid and proposal preparation cost.

These constitutional questions, however, are based on the assumption that the Comptroller General is a purely legislative officer. As shown below, the current GAO enabling statute conceives of the Comptroller General as a member of the Executive Branch, although he is independent of any direction or control by the individual executive agencies. In addition, the Comptroller General acts as an executive officer, not as a legislative officer, in deciding bid protests. This is similar to his executive function in settling public accounts and in approving or disapproving payments made by executive agencies. In this executive capacity, the Comptroller General is constitutionally subject to Presidential removal incident to his performance of executive functions, and the statute does not divest the President of this power. Finally, the separation of powers doctrine does not apply to the necessary combination of executive and legislative functions within an agency such as the General Accounting Office.

1. No more GAO can handle program + 12
2. But the same
3. Section of volume decision
4. Part VII how support of the
5. In agency + executive branch
6. And then is disagreeable -
7. That is one of the
8. And the intention is
9. regulation

I. IN DECIDING PROTESTS, THE COMPTROLLER GENERAL IS ACTING AS AN EXECUTIVE OFFICER.

A. The Comptroller General is Not Independent of the Executive Branch, but Only of the Executive Agencies.

The Comptroller General's enabling statute, the Budget and Accounting Act of 1951, provides that he shall be independent of the executive departments but specifically declines to render him independent of the Executive Branch itself. 31 U.S.C. §41 (1976). Thus, the statute, at least implicitly, conceives of the Comptroller General as a member of the Executive Branch. See 31 U.S.C. §65 (1976). Moreover, those provisions which require the Comptroller General to report to the President upon request concerning the work of his office, and to furnish information concerning expenditures and accounting to the Office of Management and Budget are further evidence of the Comptroller General's executive status, at least insofar as these functions are concerned, 31 U.S.C. §53 (1976).

B. The Comptroller General Acts in an Executive Capacity in Settling Public Accounts.

It has long been recognized that the dual functions filled by the GAO require that the Comptroller General possess both legislative and executive powers. The Comptroller General's current involvement in bid protest matters derives from his statutory authority to settle public accounts. 31 U.S.C. §§44, 71, 72 and 74 (1976). In settling these accounts, the Comptroller General is acting in an executive capacity, although independent of any direction or control by the executive departments. 31 U.S.C. §41 (1976). In conducting the separate auditing function of the GAO under the Accounting and Auditing Act of 1950, 31 U.S.C. §§ 65-67 (1976), on the other hand, the Comptroller General is clearly acting as a legislative officer. See, H. Mansfield, The Comptroller General 83-4, (New Haven: Yale Univ. Press 1939).

This duality of functions was recently recognized in United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 99-100 (D.D.C.), Aff'd, 339 F.2d 753 (D.C. Cir. 1964). There, the court explained the two functions of the Comptroller General as follows:

"The Comptroller General is the head of the General Accounting Office, 31 U.S.C. §41. Unlike heads of most departments and establishments of the Government, he occupies a dual position and performs a two-fold function. First, he makes investigations of matters relating to the receipt, disbursement and application of public funds, and reports the results of his scrutiny to the Congress with appropriate recommendations. In addition he pursues investigations that may be ordered by either House of Congress, or by any Committee of either House, in matters relating to revenue, appropriations or expenditures, 31 U.S.C. §53. In performing these functions the status of the Comptroller General is that of an officer of the legislative branch of the Government. The Congress has comprehensive authority to undertake investigations in aid of legislation, or in connection with the appropriation of funds. Investigations are an aid to legislation and to the making of appropriations and are therefore auxiliary to the basic functions of the Congress. The Congress may conduct investigations either through Committees or through an official such as the Comptroller General.

The Comptroller General also has a second status as the chief accounting officer of the Government. His second principal function is that of approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned, 31 U.S.C. §71. This is an executive function and in performing it the Comptroller General acts as a member of the Executive branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function

and in part carry out executive duties, *Humphrey's Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611. Cf. *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. Thus we have developed in comparatively recent years a fourth type of Government agency, one that combines two kinds of basic powers.

The office of Comptroller General examines all vouchers and scrutinizes all payments made by Government disbursing officers. In case any payments are found excessive, improvident, or illegal, the accounts of the disbursing officer may be surcharged accordingly. The Comptroller General may also transmit such items to the Department of Justice with a view to bringing judicial proceedings in order to secure refunds from persons to whom erroneous payments have been made. The Comptroller General is not a law officer. He does not render legal opinions. His decisions are binding and conclusive only on the Executive branch of the Government, particularly on disbursing officers." (Emphasis added.)

While holding that the Comptroller General acts as an Executive officer and not as an agent of Congress in settling accounts of disbursing officers and in approving or disapproving payments made by government agencies, the court also implicitly established that his bid protest or advance decision procedures are executive functions:

"As a matter of convenience, the Comptroller General may render advance rulings on questions whether certain payments, if made, would or would not be approved by him, 31 U.S.C. §74, 3d paragraph. Such a course is conducive to fairness and efficiency. While the statute expressly authorizes the Comptroller General to do so, it would seem that even in the absence of an explicit provision such an activity would impliedly

be within his functions. Technically a decision of the Comptroller General upon a question so submitted to him, is not a legal opinion, but a ruling or an announcement that if certain payments were made by disbursing officers in the future, they would be passed or disallowed. The disapproval would be binding and conclusive on the disbursing officer but not upon the person to whom the payment might be made. It would still be open to the latter to contest any claim for refund and interpose any defense that he may have

Applying these principles to the case at bar, the decision of the Comptroller General in this instance is equivalent to an announcement that if the contract were made with the plaintiffs, he would disallow any payments that might be made by any disbursing officer thereunder." 234 F. Supp. at 100. (Emphasis added.)

Thus, the Comptroller General would be acting in an executive capacity in resolving bid protests under Title VII since the primary basis for bid protest decisions is the statutory authority to settle public accounts. Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1313-14 (D.C. Cir. 1971). A bid protest decision is an executive function because the Comptroller General is controlling procurement policy in requiring the award to be placed with the bidder he determines to be best qualified. Essentially, he is performing an executive function by directing to whom the contract will be awarded.

Furthermore, the enabling statute itself manifests the intent of Congress to give the Comptroller General executive powers and functions. The predecessor to the present Comptroller General, the Comptroller of the Treasury, had the power of disallowance over payments made by executive agencies because he was a member of the Executive Branch. The Budget and Accounting Act of 1951 vested all of the predecessor's powers and duties in the Comptroller General, and thus retained his position as an executive officer. 31 U.S.C. §44 (1976). Congress has also delegated to the GAO the additional executive

functions of administering other legislation, such as the Federal Election Campaign Act of 1971, 2 U.S.C. §§431-54 (1976). Finally, the Cost Accounting Standards Board is also within the control of the GAO and prescribes the accounting standards for all Government operations. See 31 U.S.C. §49 (1976) and 50 U.S.C. App. §2618 (1977).

In sum, it would seem undisputed that the Comptroller General, in the exercise of certain functions acts, as a member of the Executive Branch, regardless of his separate and additional legislative functions. The Comptroller General is functioning in the bid protest area in precisely the same manner as in settling public accounts or in rendering advance decisions on the propriety of proposed payments by executive agencies. Therefore, a separation of powers problem does not arise under Title VII because the Comptroller General is acting as an executive officer.

C. The Comptroller is Appointed by the President and Subject to His Removal Power.

The Comptroller General is appointed by the President in conformity with the Appointments Clause. 31 U.S.C. §42 (1976), Buckley v. Valeo, 424 U.S. 1,128 n. 165 (1976). Despite this clear statutory provision, however, it has been contended that the Comptroller General is not an executive officer because he is not subject to removal by the President. Aside from the failure of this contention to address the initial question whether the nature of the Comptroller General's functions are executive, the statute itself does not bar the President from removing the Comptroller General. 31 U.S.C. §43 (1976). The statute provides only that Congress "may" remove him for certain enumerated reasons. It does not provide that the Comptroller General "shall only" be removed by these specific congressional procedures.

Furthermore, serious constitutional questions would arise as to the validity of Congress' complete exclusion of the President from the removal process. As Professor Mansfield states in his well thought-out treatise on the Comptroller General:

"The unconstitutionality of the Budget and Accounting Act [would follow] from the attempt of Congress to claim the removal power for itself, and not from what it confers on others." H. Mansfield, The Comptroller General, *supra*, at 90.

This result flows from the well established constitutional and statutory principle that the President's power of removal of executive officers is incident to the power of appointment. Myers v. United States, 272 U.S. 52, 119 (1926). Although Congress can validly restrict and condition the President's removal power as to other than purely executive officers (such as the Comptroller General) by fixing standards for its exercise, Congress cannot assimilate completely the executive power of removal. Humphrey's Executor v. United States, 295 U.S. 602 (1935). Since Congress cannot vest entirely within itself "the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so," it cannot similarly reserve for itself the executive power of removal which is incident to the power of appointment. Buckley v. Valeo, *supra*, at 135. Since the President is given appointment power, it is not apparent how removal in any other hands can be reconciled with the doctrine that the latter is incident to the former.

Furthermore, this grant of power to Congress must be read in conjunction with the reasonable powers exercised by the other two branches. The President should have removal power over the Comptroller General because this power can only contribute, whether exercised or not, to the effective financial administration of the United States government. It would be unreasonable to completely prohibit executive removal of an officer with such broad financial powers and jurisdiction, and whose functions include many of a purely executive character. See, H. Mansfield, The Comptroller General, *supra*, 79-84.

II. THE SEPARATION OF POWERS DOCTRINE IS NOT VIOLATED BY THE COMPTROLLER GENERAL'S AUTHORITY UNDER TITLE VII.

The separation of powers doctrine was originally based on the concept that all powers of government are divided into three distinct branches, executive, legislative and judicial, and that one branch cannot be permitted to encroach upon the powers of another. The Supreme Court has recognized that the doctrine no longer contemplates complete separation of the branches of government because such "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Buckley v. Valeo, *supra*, 424 U.S. at 121. Thus, the Supreme Court's pragmatic interpretation of the doctrine is based on the reality that governmental powers are shared and that

"enforcement of a rigid conception of separation of powers would make modern government impossible." Atkins v. United States, Ct. Cl. Nos. 41, 132, 357-76 at 64 n. 32 (May 18, 1977). Accord, Nixon v. Administrator of General Services, 45 U.S.L.W. 4917, 4921-2 (June 28, 1977). Justice Jackson summarized this understanding as follows in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952):

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

In accord with the Supreme Court's practical application of the doctrine, the separation of powers principle does not apply to the operations of an agency which has been vested with a combination of executive and legislative powers by the Congress since the theoretical and doctrinal concept of separation of powers does not stand up when faced with the practical necessities of effective government. K. Davis, Administrative Law of the Seventies, §§1.09 and 1.09-1 (1976). The doctrine has not been applied, for example, to administrative agencies such as the Federal Aviation Administration and the Veterans Administration because it would appear to render the existence of such typical agencies unconstitutional. Similarly, the combination of powers given the Comptroller must also be regarded as constitutional. As Professor Mansfield states, the "very purpose in creating most administrative agencies [and the GAO] is to effect a combination of legislative, executive, and judicial authority sufficient to accomplish pressing social tasks, but a combination that will preserve ultimate controls in all these constitutional branches." H. Mansfield, The Comptroller General, *supra*, at 89. Professor Mansfield further states that it would be a perversion of the doctrine to forbid any combination of administrative powers. *Id.*

Professor Davis explained the rationale for not applying the separation of powers doctrine to administrative agencies as follows:

"What we have discovered in facing such problems -- and we have by now had a good

deal of experience -- is that the true principle that should guide the allocation of power within the general framework is not the principle of separation of the three kinds of power but is the principle of check.

The danger is not blended power. The danger is unchecked power.

In the organic arrangements that we have been making in recent decades in the establishment and control of administrative agencies, the principle that has guided us is the principle of check, not the principle of separation of powers. We have had little or no concern for avoiding a mixture of three or more kinds of powers in the same agency; we have had much concern for avoiding or minimizing unchecked power But we have taken pains to see that the agencies report to and draw their funds from our legislative bodies, that the personnel of the agencies are appointed and reappointed by the executive, and that the residual power of check remains in the judiciary. As long as we continue to emphasize the principle of check, we may safely continue our increasingly deep-seated habit of allowing the blending of three or more kinds of power in the same agency. Davis, Administrative Law Treatise, §1.09 at 68-9 (1958).

Even if the Comptroller General were viewed solely as a legislative officer or agent of Congress, the separation of powers doctrine would not appear to be violated by his deciding bid protests. One recent commentator explained that the Comptroller General, as a legislative officer, would not be infringing upon executive functions because:

"...as a factual matter the GAO clearly acts as an independent agency in its accounts settlement role, however that role be characterized. Thus, even if the GAO's account settlement is an executive function, the GAO does not perform it as an

arm of Congress, but rather as an independent office of the Government. This is what, in my opinion, was intended by the 1921 Act and is what exists today -- an independent office to perform the account settlement function. Thus one cannot reasonably argue that an agent of Congress is performing an executive function." T. Williamson, Bid Protests and the Procurement Commission, 9 Public Contract Newsletter 1, 5 (October, 1973).

Furthermore, the Court of Claims, in Atkins v. United States, supra, at 66-67, recently established that there is no separation of powers problem when an executive officer "acts as an agent of the legislative branch of the Government." Thus, even if the Comptroller General would be acting as a legislative officer in the limited area of bid protest decisions, his status as a member of the Executive Branch in his other functions renders the separation of powers objection irrelevant since Atkins appears to enable him to act as "an agent of the legislative branch" in this limited fashion without violating the separation of powers doctrine.

Thank you again for the opportunity of expressing our views.

Respectfully submitted,

Roy S. Mitchell
Roy S. Mitchell
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34. December 1972.--Excerpt from the Report of the Commission on Government Procurement, Volume 4.

REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT

VOLUME 4

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**REPORT OF
THE COMMISSION ON GOVERNMENT PROCUREMENT**

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Part A—General Procurement Considerations

Volume 2

Part B—Acquisition of Research and Development*

Part C—Acquisition of Major Systems

Volume 3

Part D—Acquisition of Commercial Products

Part E—Acquisition of Construction and Architect-Engineer Services

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CHAPTER 3

Disputes Related to the Award of Contracts

This chapter examines the methods by which disputes are resolved during the process that leads to the award of a Government contract. Such disputes are called "award protests,"¹ and, in the following analysis, the forums that hear these complaints are collectively entitled the "award protest system."²

The first section of the chapter discusses the award protest as a means for subjecting contract solicitation and award decisions to review, either internally within the procuring agency or by an independent adjudicatory body. The section considers the nature of the contract award process, the purpose of award protests, and the characteristics of the interests that are involved in the award protest system. After this introduction to a unique aspect of Government contract law, the chapter describes the forums available for the resolution of award protests and recommends changes that are needed if the award protest system is to function fairly and effectively.

BACKGROUND

Government contracts are formed according to the same offer-acceptance principles used to form a contract between buyer and seller in private contract law. The Government usually begins the contract award process by issuing a solicitation, commonly in the form of an invitation for bids (IFB), or request for proposals (RFP), which is a request for offers to supply a particular Government need. Those

interested in doing business with the Government respond with offers in the manner called for by the solicitation. The Government then considers the offers in the way prescribed for the method of competition selected, chooses the best offer, and makes an award of a contract.

The award process in Government procurement differs from that in private exchanges in one very important respect. Government contracts are formed according to an extensive and complex set of formal rules, comprised for the most part of Federal statutes, Executive orders, executive regulations, and agency internal procedures.³ These rules prescribe the steps the parties are to take during the award process, including the proper solicitation to be used in each circumstance, the contents of the solicitation, the correct manner of response to the solicitation, the period within which a response must be made, and how the response will be evaluated. No counterpart to this elaborate system of rules exists in private contract law.

The existence of this "code of conduct" in one marketplace but not in another has come about because of differing views about the nature of the interests involved. In the commercial marketplace it "was believed that if men were free to make their own self-interested decisions whether to buy or sell there would be produced and exchanged the greatest amount of goods and services at the least price."⁴ This concept of the freedom of private businessmen to decide whether and with whom to contract also applied to how they should contract.

¹ See, e.g., 10 U.S.C. §§ 2301-14 (1970) (Armed Services Procurement Act); 32 CFR Parts 1-39 (1972) (Armed Services Procurement Regulation); Exec. Order No. 10936, 3 CFR, 1960-1963 Comp., at 486, 41 U.S.C. § 252 (1970) (reports of identical bids); and 32 CFR Parts 591-616 (Army Procurement Procedure (APP)).

⁴ L. Jaffe, *Judicial Control of Administrative Action* 4 (1946).

¹ For a definition of "award protests," see p. 3, *supra*.

² The present award protest system is depicted at p. 6, *supra*.

Government contracting, however, is undertaken for the benefit of the public. The public, through Congress, has decided that Government contracting must be accomplished in a special way, primarily by fulfilling Government needs through competitive pricing methods that assure equal opportunities for businessmen to compete as well as the lowest possible cost to the Government. Rules designed to guarantee that these goals are met have existed almost from the beginning of our present form of Government. In 1809 Congress required that purchases and contracts for supplies or services for the military be made by "open purchase or by previously advertising for proposals"¹ in order to prevent favoritism and to give the Government the benefit of competition among suppliers.²

If rules are to be effective, though, there must be some way of making those who are governed by them adhere to them. The question of how to enforce prescribed solicitation and award procedures also arose early in the history of Government procurement. In 1853, for example, a seller complained to the President that while the Secretary of the Interior had acted honestly in awarding a contract to another bidder, "he decided erroneously as to the questions of fact" in selecting the lowest bidder.³ The matter was referred to the Attorney General who advised that the Secretary of the Interior alone had the power to decide such questions of fact and that no statute provided a method by which even an erroneous decision could be revised.⁴

This early protest against the award of a Government contract identifies problems that have yet to be completely resolved. Two important questions are whether the decisions of a contracting official that lead to the award of a Government contract may be reviewed by any forum which is external to the contracting agency, and if so, who may initiate such review? Until 1970, Federal courts usually ruled that private complaints about the operation of the contract award process could not be heard in a court of law. The reason generally given was that the procurement regulations and statutes were promulgated solely for the benefit of

Government officials as guidance in performing their duties and only higher executive authority or Congress could seek compliance with those rules.⁵ However, the General Accounting Office (GAO) shortly after its creation in 1921 became receptive to direct complaints from private parties about how Government officials had acted when buying goods and services. Thus, the private "award protest" was offered as an alternative method of subjecting such administrative action to review.

Today private protests against the decisions of procurement officials are a major means of initiating review of procurement actions. In fiscal 1972, GAO handled 1,227 protests and issued 758 opinions affecting the formation of Government contracts.⁶ But the implementation of this alternative has led to further problems. Even if the private protestor has a legitimate grievance that the Government has not followed the rules, and an external forum is willing to review the contracting agency's action, does the protestor have any enforceable rights in the contract award process?

The question is not easy to answer. Part of the problem is that the award protest system has grown by trial and error. No statute specifically grants the right to a seller to challenge the solicitation or award of a Government contract, nor does any statute clearly empower protest forums such as GAO or the Federal courts to review the decisions of administrative officials made during the contract award process.⁷ Without such clear statutory right, it is uncertain whether a remedy that personally benefits the protestor can ever be granted.

Another problem in fashioning remedies is caused by the competing private and public interests at work in the contract award process. The most obvious motivation of a private firm to bid on a Government contract is to gain profit in its business ventures through performance of that contract. But the profits of a particular contract may not be the only consideration in submitting a bid or proposal. Since many businesses make Government contracting their sole or principal source of income, the award of a particular contract may

¹ Act of Mar. 3, 1809, ch. 28, § 5, 2 Stat. 536.

² 2 Ops. Atty. Gen. 257, 259 (1829).

³ 6 Ops. Atty. Gen. 224 (1853).

⁴ *Ibid.*, at 226-27.

⁵ See *Parkins v. Luke Steel Co.*, 310 U.S. 113 (1940).

⁶ See Appendix A, p. 17.

⁷ For a discussion of the statutory basis used by each forum to review award protests, see pp. 46-47, 15-17.

be vitally important if follow-on work is to be obtained. Similarly, a growing dependence on Government contracting for its source of income may cause a business to seek a contract in order to keep its plant facilities operating or its personnel employed. The Government contract, therefore, has for many businessmen a value that must be measured by more than the profit that flows directly to a company as the result of performing a specific contract.

In addition to serving the private interests of individual contractors, award protests may also serve the private interests of certain classes or groups within the procurement community. In this circumstance, the award protest functions as a means to prevent administrative action thought to be inimical to the long-range interests of the group lodging the protest.¹²

There is a public interest in ensuring that congressional policies requiring competition and equal access to the award process are implemented by competent men employing sound procedures. This is tantamount to saying that the system of proposal solicitation, evaluation, and award must have integrity to achieve basic policies. The Comptroller General often has stated that the integrity of the award process outweighs any particular pecuniary advantage to the Government that may result from an improper award.¹³ The public also has an interest in ensuring that procuring activities are capable of acting in an effective manner to implement programs and satisfy public needs.

At times the private and public interests in the award process appear to be consistent. Policies that promote competitive procedures administered with integrity will necessarily afford prospective contractors better protection in securing economic opportunities and give them little reason to protest the administration of the award process. Moreover, allowing protests to be brought to the attention of Government officials develops public confidence that the policies are being properly implemented and helps eliminate improper management practices.

On the other hand, at times these interests

will seem to be in competition. A procuring agency's view of its mission may often collide with private interests in obtaining the award and even the public interest in the integrity of the competitive system. This problem becomes most apparent and troublesome when a protest is lodged after a contract has been awarded. In this situation the delay inherent in adjudicating such protests may, from the agency's view, inhibit a successful completion of its mission. Yet failure to adjudicate legitimate protests may not only unjustly deprive the rightful recipients of their economic opportunities, it may lessen future business interest in bidding on Government contracts.

The purpose of this introduction to the nature and function of award protests has been to indicate that complex problems underlie any analysis of the present award protest system. The following sections describe the various forums and procedures used to resolve award protests. While we have not found that the present institutional structure of the award protest system is in need of fundamental modification, we do recommend that certain procedural changes be made in order for the system to operate with the greatest fairness and effectiveness.

THE PROCURING AGENCY

A protestor may always lodge a protest with the agency that has issued the solicitation on which the protest is based. GAO regulations, in fact, now urge that the protestor first seek resolution of its complaint with the procuring agency before it proceeds to GAO.¹⁴ Adjudication of award protests by procuring agencies is conducted in an informal manner. No hearings are held, and no right of appeal to a quasi-judicial forum such as a board of contract appeals exists.

Where there has been a written protest, the agency generally makes its decision on the written record compiled from the contract file and any documents submitted to the contracting officer by parties to the protest. The regulations state that where a protest has been

¹² See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Lodge 1188, American Federation of Gov. Emp. v. Peine*, 435 F.2d 882 (D.C. Cir. 1970). See also *Contractors Ass'n. of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

¹³ 42 Comp. Gen. 268, 272 (1943).

¹⁴ 4 CFR § 20.2(a) (1972).

received before award the procuring agency should, when desirable, solicit the views of GAO regarding the protest before an award is made.

Fairer Treatment and Consideration of Award Protests

Recommendation 13. Promulgate award protest procedures that adequately inform protestors of the steps that can be taken to seek review of administrative decisions in the contract award process.

In 1968 the Senate Select Committee on Small Business concluded that "[p]resent procedures for handling [award] protests are entirely inadequate and unsatisfactory. A complete revision of these procedures is required."¹⁴ Despite the committee's recommendation that "[p]rocurement regulations should be revised so as to fully acquaint bidders with the opportunities and procedures for filing [award] protests,"¹⁵ the present state of these regulations continues to be a source of dissatisfaction with the award protest system.

General guidance for processing award protests is contained in the Armed Services Procurement Regulation (ASPR)¹⁶ and the Federal Procurement Regulations (FPR),¹⁷ and most procuring agencies have, to some extent, supplemented these regulations with their own internal procedures.¹⁸ The primary fault of ASPR and FPR is that they do not tell the protestor how to use the procuring agency to resolve the protest. The thrust of these regulations is to inform the agency officials as to

what administrative actions must occur in the event a protest is received.

Contracting officers are required to "consider all protests or objections to the award of a contract, whether submitted before or after award,"¹⁹ but not all contracting officers actually decide award protests. Some agencies have a policy of deciding all protests at a high management level, while other agencies resolve them at various levels throughout the organization.²⁰ The regulations do not tell a protestor where a protest should be lodged in each case, what officials will have responsibility for deciding the protest, and whether individual or group conferences with either agency officials or all affected parties in attendance can be requested.²¹

ASPR and FPR provide that the contracting officer "may require that written confirmation of an oral protest be submitted"²² but are not explicit regarding the manner in which a protest may be lodged or what the contents of the protest should be. No automatic dissemination of pertinent information is provided to all affected parties, and no provision is made for equal access by the protestor and all affected parties to the pertinent documents compiled and submitted by the Government and the parties to the protest.

In the event of a postaward protest—the type most potentially disruptive of an agency's program—ASPR and FPR offer few guidelines even for agency officials. They provide that the contractor who has been awarded the contract shall be notified of the pending protest, and the contracting officer may seek a mutual agreement with the contractor to suspend performance on a no-cost basis if the delay in receiving the supplies and services is not prejudicial to the Government's interest and it appears likely that the award may be invalidated.²³ ASPR and FPR and most agency in-

¹⁴ ASPR 2-407.8(b)(2); FPR 1-2.407-8(b)(3).

¹⁵ Senate Select Committee on Small Business, Subcommittee on Government Procurement, *Selected Problems of Small Business in the Area of Federal Procurement*, S. Rep. No. 1671, 90th Cong., 2d Sess. 2 (1968).

¹⁶ *Ibid.*

¹⁷ Procedures for protests against the award of advertised procurements are contained in ASPR 2-407.8. "Protests against awards of negotiated procurements shall be treated substantially in accordance with 2-407.8." ASPR 3-509.

¹⁸ Procedures for protests against the award of advertised procurements are contained in FPR 1-2.407-8. FPR contains no provision similar to ASPR 3-509 for protests against the award of negotiated procurements.

¹⁹ See, e.g., AFP 192.407-8; DSPR 1202.407-5; HEWFR 3-2.407-8; AGPR 4-2.407-8; GSPR 5-2.407-8; NASA PR 2.407-8; HUDPR 24-2.407-8; AECPR 9-2.407-8; VAPR 8-2.407-8; IPR 14-2.407-8.

²⁰ ASPR 2-407.8(a)(1); second, FPR 1-2.407-8(a)(1).

²¹ For example, one such regulation states "[i]t is the responsibility of the contracting officer to decide whether a protest has a valid basis and to take appropriate action when possible without referral to NASA Headquarters." NASA PR 2.407-8(a)(2). Another, however, states "[e]xcept as outlined above (when protests will be referred to agency headquarters), the Staff Officer responsible for procurement at the Major Command headquarters is authorized to render final decisions on protests before and after award which are lodged at no higher than Major Command level." AF ASPR Supp. 2-407.8(a).

²² See 4 CFR § 20.1, 20.9 (1972).

²³ ASPR 2-407.8(b); FPR 1-2.407-8(b)(1).

²⁴ FPR 1-2.407-8(c); second, ASPR 2-407.8(c).

ternal regulations do not provide for the occasion when a contractor refuses to stop work on a no-cost basis.²⁶

The primary focus of award protest resolution and avoidance must be in the procuring agencies. Although it appears to have been the intent of the basic procurement regulations to leave much of the procedural development of award protest regulations to the individual agencies, this has not occurred. Accordingly, the use of a contracting agency to resolve award protests should be promoted by including award protest procedures in the basic procurement regulations that adequately inform protestors of the steps that can be taken to seek review of administrative decisions.

If the utility of an award protest system is acknowledged by agency officials and the use of such a system is encouraged, the result should be beneficial both to prospective contractors and to contracting agencies. Agency officials have asserted that the current rise in protests is attributable to shrinking procurement expenditures and the consequent necessity for sellers to fight for every contract solicited. The point often missed is that previous failures to protest during more expansive periods may have sanctioned bad management practices for which the agencies only now are being held accountable. If no stigma is attached to an award protest, prospective contractors will feel freer to seek immediate correction of unfair treatment, and the contract award process eventually may be improved thereby to the extent that protests will be greatly minimized.

It is not the purpose of this recommendation to hamstring procurement actions through prolonged disputes with contractors. The procuring agency award protest procedures should provide a means for contractors to receive fair consideration for the award. However, the agency review should be conducted in an informal manner by higher management authority rather than through an adversary-type proceeding.

²⁶ Several agencies, however, have attempted to establish procedures for contracting officers to follow in the event a contractor refuses to enter into a mutual agreement to stop work on a no-cost basis. See HUDPR 24-2.107-8(b); DSPR 1302.497-9(e)(2); APP 892.497-4(j)(3).

GENERAL ACCOUNTING OFFICE

A protestor may lodge an award protest with GAO in accordance with procedures published in the Code of Federal Regulations.²⁷ Those procedures allow an "interested party" to protest the award (or proposed award) of a contract by or for a Government agency whose accounts are subject to settlement by GAO.²⁸ An interested party is one whose economic interest may be involved in the procurement and includes offerors for Government contracts, potential contractors, subcontractors, labor unions, and other associations.²⁹

The number of award protest cases received by GAO has steadily increased over the past few years. As shown in table 4, GAO rendered 715 protest decisions involving 34 different agencies in fiscal 1971. That same year it handled 1,054 award protest cases, including 339 cases that were withdrawn by protestors or closed for various reasons, including agency cancellation of the procurement or positive agency action in response to the protest.³⁰

TABLE 4. AWARD PROTEST DECISIONS
RENDERED BY GAO DURING FISCAL 1971

Department	Total
Agency for International Development	2
Agriculture	13
Air Force	114
Architect of the Capitol	3
Army	168
Atomic Energy Commission	6
Civil Service Commission	1
Commerce	3
Defense (OSD)	3
Defense Supply Agency	68
District of Columbia Government	11
Federal Communications Commission	2
Federal Housing Administration	1
General Services Administration	57
Government Printing Office	4

²⁷ See 4 CFR Part 20 (1972).

²⁸ 4 CFR § 20.1(a) (1972). Not all agency procurement decisions are reviewed by GAO. For example, the Comptroller General has declined to adjudicate award protests involving TVA except upon the request of TVA. Comp. Gen. Dec. B-174523, Nov. 23, 1971. Unpublished. See 16 U.S.C. § 831h (1970). Protests involving Postal Service contracts also are not adjudicated by GAO. See 39 U.S.C. § 2008(c) (1970); Postal Service Protest P 71-11.

²⁹ Shattner, *Handling Bid Protests Before GAO*, Briefing Papers, No. 78-3, June 1978, at 2. Address by Paul C. Dembling, General Counsel, U.S. General Accounting Office, before a National Contract Management Association, Washington, D.C., Chapter Meeting, Sept. 14, 1971.

³⁰ See Appendix A, p. 77.

TABLE 4. AWARD PROTEST DECISIONS
RENDERED BY GAO DURING FISCAL 1971—
Continued

Department	Total
Health, Education, and Welfare	13
Housing and Urban Development	8
Interior	20
Internal Revenue Service (Treasury)	3
Justice	2
Labor	5
Marine Corps	1
Maritime Administration	1
National Aeronautics and Space Admin.	18
National Institutes of Health	1
Navy	142
Office of Economic Opportunity	3
Panama Canal Company	1
*Post Office	10
State	2
*Tennessee Valley Authority	1
Transportation	19
Treasury	1
Veterans Administration	8
Total	716

*Protests involving procurements by these agencies are no longer adjudicated by GAO.

Source: General Accounting Office, *Annual Report of the Comptroller General of the United States, 1971*.

Authority of GAO to Adjudicate Protests

Recommendation 14. Continue the General Accounting Office as an award protest-resolving forum.*

Despite the evident popularity of GAO as a forum for deciding award protests, its authority to consider award protests and issue decisions that are binding on procuring agency officials or on any other officials of the executive branch has been questioned by the Attorney General of the United States and by members of the procurement community. This concern is based on interpretations of the Constitution and of the statutes that give GAO the authority to settle public accounts. To understand the nature of these objections, it is first necessary to understand the rationale used by GAO for intervention in the contract award process.

GAO issued its first award protest decision

in 1924,³¹ three years after it had been created by the Budget and Accounting Act of 1921. The Budget and Accounting Act grants GAO authority to settle and adjust "[a]ll claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor. . . ."³² In settlement of public accounts, "[b]alances certified by the General Accounting Office . . . shall be final and conclusive upon the Executive Branch of the Government. . . ."³³ The Comptroller General also may render a decision, upon the application of the head of an executive department (or other establishment not under any of the executive departments) or a disbursing officer, "upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."³⁴

While the foregoing statutes contain no express authority for GAO to adjudicate award protests, GAO has interpreted its duty to audit and settle public accounts as containing an obligation to determine the legality of contract expenditures and assure compliance with the laws and regulations relating to expenditure of public funds. GAO has concluded that by deciding award protests it is preventing unauthorized payments by determining in advance the validity of a contract that obligates public funds.³⁵ The fact that, until 1970, no other forum independent of the procuring agency existed to insure that the contract award process operated with integrity is also cited as a reason for GAO's actions in this area.³⁶

The Attorney General, in a 1971 letter to

³¹ Comp. Gen. Dec. A-4471, Sept. 20, 1924, Unpublished (non-award protest). In 1925 the Comptroller General rendered the first GAO decision on a protest made before the award of a contract. Comp. Gen. Dec. A-10024, Aug. 19, 1925, Unpublished.

³² 31 U.S.C. § 71 (1970).

³³ 31 U.S.C. § 74 (1970).

³⁴ *Ibid.* See 31 U.S.C. § 82d (1970) for similar provision relating to certifying officers.

³⁵ See address by Robert F. Keller, Assistant Comptroller General of the United States, before a Joint Program of the Government Contracts Committees of the District of Columbia, Federal, and American Bar Associations, Washington, D.C., Mar. 24, 1971; address by Paul G. Dembling, General Counsel, U.S. General Accounting Office, before a National Contract Management Association San Francisco Area Chapter Meeting, Oct. 6, 1970. See also 17 Comp. Gen. 354, 647 (1938).

³⁶ See Keller address, *supra* note 35.

*See dissenting position, *infra*.

the Comptroller General commenting on GAO's proposed new award protest procedures, expressed the view that the awarding of Government contracts is purely an executive function, because "the authority to withhold awards and reject bids is reposed by statute only in the heads of Executive departments or agencies and certain specified offices of the military departments."²⁷ Neither the Federal courts nor Congress has asserted this view. Over a period of years the courts have given tacit approval to adjudication of award protests by GAO.²⁸ One court recently recognized GAO as having special competence in dealing with award protests and characterized the use of the court's injunctive powers to prevent contract action while the matter is decided by GAO as a "felicitous blending of remedies and mutual reinforcement of forums. . . ."²⁹ Moreover, the absence of congressional intervention, in the face of committee investigations into the operations of the award protest system³⁰ and annual reports to Congress from GAO about its activities,³¹ indicates that GAO also exercises jurisdiction over award protests with the acquiescence of Congress.

Adjudication of award protests by GAO serves several important functions in the procurement process. GAO's separation from the contracting agencies assures contractors that their complaints are considered free from any bias toward individual agency policies and thus promotes the confidence of both private enterprise and the general public that Government business is conducted with integrity. Such separation from the daily concerns of the contracting agencies also allows GAO to frame and solve problems in terms of the over-

all best interests of the Government. The award protest decisions issued by the Comptroller General within the past five decades form a cogent body of Government contract law that is useful for guidance in solving individual problems occurring in the contract award process and provide a basis for development of more generally applicable procurement regulations. GAO's establishment as an administrative forum potentially allows it to afford a speedier solution of disputes than would be possible if Federal courts were the only arbiter.

We recommend that GAO continue to adjudicate award protests. We do not attempt here to offer legal argument that will lay at rest the issue of the constitutionality of this function. Such an issue only can be resolved by the Supreme Court of the United States.

DISSENTING POSITION

One Commissioner believes that the constitutionality question discussed above could be satisfactorily resolved administratively through the simple act of shifting the entire protest-resolving apparatus (people, records, and all) from its current residence in the GAO to the Department of Justice. Such action would preserve the body of case decisions developed over the years by the GAO, would retain the personal expertise developed by GAO personnel in resolving disputes, and would not disrupt the processing of protests under consideration, were the physical move accomplished in a well-executed fashion. Conceivably, the shift could be accomplished without even the necessity for much physical relocation of records and personnel if administrative jurisdiction and control over the protest-resolving function were simply shifted from the GAO to the Department of Justice while the bulk of the personnel involved remained in their present location.

He believes that administrative attempts at resolution of the constitutionality question should be pursued between the Comptroller General and the Attorney General, short of initiating any action to seek resolution by the Supreme Court.

²⁷ Letter from John Mitchell, Attorney General of the United States, to Hon. Elmer B. Staats, Comptroller General of the United States, June 14, 1971.

²⁸ See *John Reiner & Co. v. United States*, 163 Ct. Cl. 381, 325 F.2d 458 (1963); *A.G. Schoenmaker Co. v. Resor*, 446 F.2d 726 (D.C. Cir. 1971); *M. Steinhilf & Co. v. Seawans*, 458 F.2d 1289 (D.C. Cir. 1971).

²⁹ *Wheelabrator Corp. v. Chafco*, 455 F.2d 1808, 1316 (D.C. Cir. 1971).

³⁰ See *Selected Problems of Small Business in the Area of Federal Procurement*, S. Rep. No. 1671, *supra* note 14; House Committee on Government Operations, *Eighteenth Report, GAO Bid Protest Procedures*, H.R. Rep. No. 1134, 90th Cong., 2d Sess. (1968).

³¹ U.S. General Accounting Office, *Annual Report of the Comptroller General of the United States*, 1970, H.R. Doc. No. 92-14, 92d Cong., 1st Sess. 110-12 (1971); U.S. General Accounting Office, *Annual Report of the Comptroller General of the United States*, 1971 131-33 (1972).

Expedition in Processing Protests

Recommendation 15. Establish, through executive branch and GAO cooperation, more expeditious and mandatory time requirements for processing protests through GAO.

The first step in GAO adjudication of award protests requires the procuring agency to submit an administrative report. Agency regulations provide that the report shall include copies of the protest, the solicitation, and the relevant bids or proposals, plus other pertinent documents and a statement by the contracting officer setting forth his findings, actions, and recommendations in the matter.⁴² The average time required by agencies to prepare these administrative reports and forward them to GAO was approximately 48 days during 1968-1972.⁴³

After the administrative report is received, GAO begins consideration of the protest. The protestor is normally permitted to review, copy, and comment on the contracting agency's administrative report.⁴⁴ The contracting agency, in turn, is permitted to review and comment on any material submitted by the protestor. Likewise, the rules now provide that GAO will make available to any interested party relevant information that has been submitted by other interested parties or agencies.⁴⁵

After all documents have been submitted, and requested conferences held, an assigned attorney within the Office of General Counsel writes an opinion. The opinion is then reviewed through successive levels of the organization

and subsequently issued as a Comptroller General decision. The average time required for GAO to decide an award protest after receiving the administrative report has increased each year. In calendar 1968 the average time needed to process an award protest was 34 days. In fiscal 1972 GAO needed 61 days.

Table 5 indicates the average total time that elapsed before a case was decided by GAO during 1968-1972. This average processing time, which includes the time needed by the agency to prepare and forward the administrative report and the period needed by GAO to adjudicate the protest, increased from 88 days in calendar 1968 to 116 days in fiscal 1972.

Both contractors and contracting agencies have been critical of the upward spiral of time needed for GAO adjudication of award protests. Contractors complain that not only must production capability be maintained during the protest period, with no practical possibility for recompense of costs incurred during delay, but other business opportunities also may have to be bypassed by companies or their employees.⁴⁶ Government agencies state that delay in performance of a contract often impedes the successful accomplishment of agency goals.⁴⁷

On December 23, 1971, GAO published new

⁴² See Statement of Daniel Rosa, Esq., before the Commission on Government Procurement's Remedies Study Group, Washington, D.C., Feb. 17, 1971; Statement of Michael Rukin, President, Analytical Systems Corporation, Burlington, Massachusetts, before the Commission on Government Procurement's Remedies Study Group, Boston, Massachusetts, Mar. 24, 1971.

⁴³ See Letter from Major General Edmund F. O'Connor, DCS/Procurement and Production, Dept. of the Air Force, Hq. Air Force Systems Command to Vice Admiral Joseph M. Lyle, USN Retired, National Security Industrial Association, Sept. 16, 1971; *Bid Protests: DOD Surveys Indicate More Bid Protests Filed, Higher Percentage of Bid Protests Denied*, 418 FCR, Feb. 28, 1972, A-1 at A-2; Markey, *GAO Protests—A Mounting Problem*, *Hq. U.S. Naval Material Command Procurement Newsletter*, Quarterly Review (July-Sept. 1971).

⁴⁴ ASPR 2-407.8(a) (2); FPR 1-2.407-8(a) (2).

⁴⁵ See table 5 infra.

⁴⁶ See 4 CFR § 20.6 (1972).

⁴⁷ 4 CFR § 20.7 (1972). See also 4 CFR §§ 20.5, 20.6 (1972).

TABLE 5. AGENCY AND GAO AVERAGE AWARD PROTEST PROCESSING TIME

Year	No. protests decided by GAO	Total avg. processing days**	Avg. agency processing days	Avg. GAO processing days
1972*	758	116	49	61
1971*	716	110	49	57
1970	625	94	46	42
1969	533	92	47	38
1968	568	88	47	34

*Reported on a fiscal year basis. Remainder are reported on a calendar year basis. Data rounded by the Commission.

**Total does not equal "average agency processing days" plus "average GAO processing days." Extra days are attributable to other parties.

Source: Based on statistics supplied by Office of General Counsel, General Accounting Office.

protest procedures.³⁰ Unlike its previous procedures, the new procedures provide time constraints on the various steps of award protest adjudication. For example, the new procedures attempt to cut the average 48-day period used by contracting agencies to submit an administrative report to "20 [working] days after receipt by the agency of the complete statement of protest. . . ." Recent statistics have shown an average reduction of approximately 25 working days in the time needed to resolve protests received after the new procedures were implemented.³¹

GAO's attempt, through its new procedures, to reverse the annual increase in award protest processing time has not been fully implemented by the executive branch.³² GAO itself has concluded that it "has no authority . . . to impose time limits on contracting agencies for reports on protests. . . ." ³³ The freedom of individual agencies to submit administrative reports according to their own schedule has led to frequent complaints that executive agencies have prejudiced a protestor's position by waiting until a contract has been partially performed before such documents are submitted to GAO, knowing that GAO often has been reluctant to overturn an award in such circumstances.

The complete solution to this problem cannot be achieved by one agency alone. It is evident that the impetus for expediting the process must come from all the Government agencies involved in the resolution of protests. If the agencies are confused about their authority and relationship to each other, and if this confusion causes resistance and lack of cooperation in expediting decisions, then achievement of the goal surely must fail. For the system to operate with fairness the agencies must act together to provide a comprehensive, coordinated regulatory system for resolution of disputes pertaining to the award of Government contracts.

³⁰ 36 Fed. Reg. 24791 (1971). See 4 CFR Part 20 (1972).

³¹ Figure is based on statistics furnished by Office of General Counsel, U.S. General Accounting Office.

³² See Letter from George P. Shultz, Director, Office of Management and Budget, Executive Office of the President, to Hon. Elmer B. Staats, Comptroller General of the United States, June 3, 1971; Letter from John Mitchell, Attorney General of the United States, to Hon. Elmer B. Staats, Comptroller General of the United States, June 14, 1971.

³³ 36 Fed. Reg. 24791 (1971).

Procedures for Considering Award Protests

In the past the GAO protest procedure was normally *ex parte*.³⁴ An opportunity was afforded the protestor to have an informal meeting with the GAO attorney assigned to the protest or other GAO officials. Only in rare instances were joint conferences held with all interested parties in attendance. The new GAO procedures now provide that all interested parties will be given an opportunity to attend a conference requested by any of the other parties to the protest.

GAO prepares no transcript of any type of informal conference, and no provision is made for the taking of sworn testimony or the cross-examination of witnesses. The GAO decision on the protest is based entirely on the record in its file, compiled from the agency report and other documents submitted by interested parties.

The complaint has been made that GAO has failed to adopt appropriate procedural safeguards that ensure impartiality in adjudication of award protests. There are two parts to this source of dissatisfaction.

WEIGHTING OF EVIDENCE

When facts submitted by a protestor are disputed by the facts contained in the procuring activity's administrative report on the protest, GAO has stated in the past that "in the absence of evidence sufficiently convincing to overcome the presumption of the correctness of the administrative report, this Office will accept the administrative report as accurately reflecting the disputed facts."³⁵ It is charged that the use of such a presumption prevents GAO from making an independent evaluation of all the issues presented to it.³⁶ Although

³⁴ No formal hearing was held on the merits of the protest. Communications about the protest were *ex parte* in the sense that they usually were limited to an exchange of views between a GAO official and one party to the protest. Other parties to the protest were normally not made privy to these communications. See Shultz, *supra* note 23, at 4-5.

³⁵ 11 Comp. Gen. 47, 54 (1961); accord, 46 Comp. Gen. 631, 646 (1967). See also 87 Comp. Gen. 868, 870 (1968); 16 *id.* 1106, 1106 (1957); 3 *id.* 51, 54 (1925).

³⁶ See Statement of Theodore M. Kinton, Esq., before the Commission on Government Procurement's Remedies Study Group, Washington, D.C., Feb. 17, 1971; Statement of W. Stanfield Johnson, Esq., *id.*; American Bar Association, Public Contract Law Section, *Report of the Committee on Bids and Protests*, June 1971 (unpublished).

such statements have not appeared in recent GAO decisions, the impression persists that GAO still relies on this "presumption of correctness" when adjudicating award protests.

Another complaint relates to the evaluation of technical matters in a protest. Though GAO on certain occasions has sought independent evaluation and advice from an impartial Government agency, normally the soliciting agency's technical evaluations are substituted for GAO's own judgment. It is charged that this procedure also causes the evidence in a protest to be unfairly weighted in favor of the contracting agency.

FACTFINDING PROCEDURES

A second part of the complaint about the failure to provide due process adjudication of award protests deals with the manner in which GAO gathers evidence.⁴³ Although the present rules do provide for group conferences, ex parte communications are not expressly prohibited. The procedure of using ex parte communications has been criticized for its tendency to put evidence before GAO that is not known to the other party and, therefore, not rebuttable through other witnesses or documentation. Failure to provide open, oral hearings, with the opportunity for confrontation and cross-examination of witnesses, also enables parties, it is claimed, to give slanted versions of the facts to GAO. Finally, the inability of one party, through lack of discovery power, to obtain disclosure of facts in the exclusive possession of another often prevents that party from presenting evidence necessary for the successful demonstration of the merits of its case.

CONCLUSIONS

GAO has made a conscientious endeavor to respond to such criticism. It now provides for the automatic dissemination of pertinent data to interested parties, seeks to reduce ex parte communications, and no longer gives as much weight to the "presumption of correctness" in administrative reports.

⁴³ See Statement of Theodore M. Koston, Esq., *supra* note 34; American Bar Association, Public Contract Law Section, *Report of the Committee on Bids and Protests*, *supra* note 34.

We commend GAO for its responsiveness and recommend that it continue to improve its procedures for handling award protests. In making this observation, we recognize of course that a balance must be preserved between due process and prompt handling of disputes. There are distinctive values in the informality and flexibility of the GAO award protest procedures. To concentrate too heavily on the due process aspect would diminish these values.

We do not recommend, therefore, that GAO adopt the full battery of due process procedures used in a court of law but only those that will insure "basic fairness" or objective consideration of award protests. To do otherwise could destroy the protestor's option of obtaining a prompt and economical administrative determination of its protest. The Federal courts are a reasonable alternative forum in which to lodge a protest if the complexity or importance of the protest requires the use of more formalized factfinding procedures. It is essential, in our estimation, that GAO strive to provide swift, economical, and informal resolution of protests.

Review of Decision to Award Contract During Pending Protest

Recommendation 16. Establish in the executive procurement regulations, in cooperation with the General Accounting Office, a coordinated requirement for high-level management review of any decision to award a contract while a protest is pending with GAO.

In an attempt to restrain the award of a contract while a protest is pending with GAO, the new GAO award protest procedures provide:

When notice is given the agency that a protest has been filed with the General Accounting Office, award shall not be made prior to a ruling on the protest by the Comptroller General, unless there has first been furnished to the General Accounting Office a written finding by the head of the agency, his deputy, or an Assistant Secretary (or equivalent), specifying the factors which will not permit a delay in the award until

issuance of a ruling by the Comptroller General.⁵⁴

The basic executive procurement regulations, however, provide that:

Where a written protest against the making of an award is received, award shall not be made until the matter is resolved, unless the contracting officer determines that:

- (i) the items to be procured are urgently required; or
- (ii) delivery or performance will be unduly delayed by failure to make award promptly; or
- (iii) a prompt award will otherwise be advantageous to the Government.⁵⁷

The regulations further provide that when a protest has been lodged with GAO prior to award a contracting officer must seek approval at "an appropriate level above that of the contracting officer, in accordance with Departmental procedures," if he decides to proceed with an award despite the pending protest.⁵⁸ The "appropriate level" for approval varies with each agency. For example, one agency regulation requires the approval of a "superior officer" while a second agency regulation requires approval by the Deputy for Procurement within the office of an Assistant Secretary. The only coordination required with GAO is that the contracting agency notify GAO of the intent to make an award and inquire regarding the status of the protest.⁵⁹

GAO has concluded that it has no power to compel the agencies to withhold award while a protest is pending with GAO.⁶⁰ We believe that agencies should retain the authority to make an award while a protest is pending with GAO. Such decisions should be based, however, on a high-level agency finding as stated in the GAO procedures.

Effective Remedy for Protestor

Recommendation 17. GAO should continue to recommend termination for convenience of the Government of improperly awarded contracts in appropriate instances.

The majority of protests are not lodged with GAO until after an award has been made.⁶¹ While GAO should have discretion in recommending that a contract be canceled or merely that corrective action be taken with respect to future procurements, it is important to provide protestors with an effective remedy when they are wrongfully denied an award.

Since our study began, GAO has recommended in several protest cases that an improperly awarded contract be terminated for the convenience of the Government and re-awarded to the protestor who proved entitlement to that award.⁶² Such a procedure is meritorious in that it often provides an effective remedy to a protestor without unduly penalizing the contractor who erroneously has been allowed to begin performance. We recommend that this remedy continue to be used in appropriate circumstances.

FEDERAL COURTS

Until 1970, Federal courts generally held that they would not, on the complaint of a private party, review the actions of administrative officials in soliciting or awarding a Government contract. The Supreme Court in 1940 reasoned in *Perkins v. Lukens Steel Co.*⁶³ that protestors had no "standing" to seek judicial review of contracting agency decisions because Federal procurement statutes bestowed no "litigable rights upon those desirous of selling to the Government."⁶⁴ To have standing to sue

⁵⁴In fiscal 1972, 35 percent of all protests decided were lodged after award. In fiscal 1971, 40 percent were lodged after award. Moreover, 26 percent of the decisions involving protests lodged before award were rendered after an award in fiscal 1972. See Appendix A, p. 78.

⁵⁵Sec. 4.1, 61 Comp. Gen. 423 (1972); 51 id. 253 (1971); 51 id. 62 (1971); 49 id. 809 (1970).

⁵⁶310 U.S. 113 (1940).

⁵⁷"The five major questions about judicial review of administrative action are whether, when, for whom, how, and how much judicial review should be provided. The question of who may challenge administrative action—the third of the five major questions—is customarily discussed by courts in terms of 'standing' to challenge." K. Davis, 3 *Administrative Law Treatise* 208 (1958).

⁵⁸310 U.S. at 127. This doctrine was first clearly pronounced in a suit against Denver city officials by a bidder on a city contract, and the case has served as precedent for subsequent cases involving the award of Federal contracts. See *Colorado Pav. Co. v. Murphy*, 78 F. 28 (8th Cir. 1907), appeal dismissed, 186 U.S. 719 (1907). See also *O'Brien v. Carnes*, 6 F. Supp. 761, 762 (D. Mass. 1954). In *Perkins* the Supreme Court stated that § 2709 of the Revised Statutes, requiring public advertising for contracts, "was not en-

⁵⁹4 CFR § 29.4 (1972).

⁶⁰ASPR 2-407.8(b)(3); FPR 1-2.407-8(b)(4).

⁶¹ASPR 2-407.8(b)(2); accord FPR 1-2.407-8(b)(3).

⁶²ASPR 2-407.8(b)(2); FPR 1-2.407-8(b)(3).

⁶³See 36 Fed. Res. 24791 (1971).

the Government, the protestor was required to show "injury or threat to a particular right of [its] own, as distinguished from the public's interest in the administration of the law."⁴⁴

In 1970 the United States Court of Appeals for the District of Columbia Circuit held in *Scanwell Laboratories, Inc. v. Shaffer*⁴⁵ that Scanwell had standing under the Administrative Procedure Act (APA)⁴⁶ to sue the Government as a "private attorney general" seeking to protect the public interest in "having agencies follow the regulations which control government contracting."⁴⁷ The court found that certain decisions issued by the

Supreme Court following *Perkins v. Lukens Steel Co.* in cases not involving Government contracting, plus the adoption of the APA in 1946, indicated that the *Perkins* decision was no longer viable law. Shortly thereafter, the Court of Claims, using a different standard but agreeing with the *Scanwell* decision, followed suit by ruling that an unsuccessful bidder who made a prima facie showing that the Government acted arbitrarily and capriciously in awarding a contract to another bidder had standing to sue for money damages.⁴⁸

The factfinding procedures and types of relief available in the courts to the parties in a judicial award protest differ from those available in the administrative forums. The courts use formal trial procedures, thus allowing a party to the protest, for example, to confront and cross-examine witnesses and discover documents in the possession of another party. The district courts have the power to issue injunctions in order to halt performance or award of a contract temporarily pending a hearing on the merits of the case⁴⁹ or to direct the award permanently to a protestor.⁵⁰ The Court of Claims has no injunctive powers⁵¹ but may award any amount of damages.⁵²

The protestor also may seek the help of the courts in enjoining further agency action until GAO has decided the issue on its merits.⁵³ If the protestor does lodge its initial protest with GAO, it may then, if dissatisfied with the GAO decision, lodge the same protest with a Federal court.⁵⁴ One court has indicated that, in considering a protest which had been previously adjudicated by GAO, the action of the agency in following GAO recommendations should not be overturned where such action

acted for the protection of settlers and confers no enforceable rights upon prospective bidders." 310 U.S. at 128 (1940). From 1940 until 1970 a majority of lower Federal courts followed the *Perkins* rationale and ruled in subsequent award protest cases that offerors for Government contracts have no standing to challenge administrative actions of procurement officials in the contract award process. See *Walter P. Villers Co. v. Blinn*, 156 F.2d 914, 916 (5th Cir. 1946); *Fried v. Lee*, 221 F.2d 94, 100 (D.C. Cir. 1955); *Adelman v. Federal Housing Administration*, 282 F.2d 394, 397 (2d Cir. 1967); *Lind v. Stanta*, 289 F. Supp. 182, 184-86 (N.D. Cal. 1968); *Pierson, Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process*, 12 B.C. Int. & Com. L. Rev. 1, 4-7 (1970); Comment, *The Erosion of the Standing Impediment in Challenges by Disappointed Bidders of Federal Government Contract Awards*, 39 Fordham L. Rev. 102, 105-112 (1970). Judicial review of award protests also has been denied on the ground that administrative procurement decisions are unreviewable because such decisions are essentially discretionary in nature. *O'Brien v. Carney*, 6 F. Supp. 761, 762-63 (D. Mass. 1934). See *United States Wood Preserving Co. v. Sundmacher*, 184 F. 678, 683 (6th Cir. 1911) (municipal award protest). See also note 86 *infra*.

⁴⁴ 310 U.S. at 123.

⁴⁵ 424 F.2d 869 (D.C. Cir. 1970).

⁴⁶ The act provides that "[n]o person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1970). Judicial review is precluded, however, if a statute precludes review or "agency action is committed to agency discretion by law." 5 U.S.C. § 701 (1970). Under § 706 the court has the power to "compel agency action unlawfully withheld or unreasonably delayed (and) to hold unlawful and set aside agency action, findings, and conclusions" found to be unacceptable under certain standards prescribed by the act, including agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."

⁴⁷ 424 F.2d at 864. Although for almost 30 years *Perkins v. Lukens Steel* was viewed as barring suits against the Government by prospective contractors, in a few isolated cases standing was granted to disappointed or potential bidders. See *Heper Products Company v. United States*, 135 Cl. Ct. 62, 140 F. Supp. 409 (1956) (unsuccessful bidder is entitled to recover cost of preparing bid if bid not invited in good faith); *Gonzalez v. Freeman*, 324 F.2d 870 (D.C. Cir. 1964) (plaintiff has standing to challenge debarment process by which he was prevented from doing business with the Government); *Superior Oil Company v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969), vacated sub nom., 421 F.2d 1089 (D.C. Cir. 1969) (court may issue permanent injunction directing award to bidder and barring award to another bidder for Government oil lease); *Pierson*, *supra* note 45, at 7-11; E. Davis, *Administrative Law Treatise* 781-82 (Supp. 1970); Johnson & Cole, *Scanwell and Its Implications on the Adjudication of Disputes Over the Award of Government Contracts*, June 1971, at 3-10 (unpublished paper prepared for the Commission on Government Procurement).

⁴⁸ *Keco Industries, Inc. v. United States*, 192 Cl. Ct. 773, 428 F.2d 1232 (1970).

⁴⁹ When such temporary relief should be granted is discussed in *M. Steinthal & Co. v. Seawans*, 455 F.2d 1289 (D.C. Cir. 1971). See *Wharelator Corp. v. Chafec*, 455 F.2d 1304 (D.C. Cir. 1971).

⁵⁰ *Superior Oil Company v. Udall*, 409 F.2d 1115 (D.C. Cir. 1969), vacated sub nom., 421 F.2d 1089 (D.C. Cir. 1969). See *Simpson Electric Co. v. Seawans*, 317 F. Supp. 644 (D.D.C. 1970). This remedy has been directed infrequently.

⁵¹ The jurisdiction of the Court of Claims is limited to money claims against the United States. *United States v. Kipps*, 306 U.S. 1 (1969).

⁵² 28 U.S.C. § 1491 (1970).

⁵³ See *M. Steinthal & Co. v. Seawans*, 455 F.2d 1289 (D.C. Cir. 1971); *Wharelator Corp. v. Chafec*, 455 F.2d 1304 (D.C. Cir. 1971).

⁵⁴ See *M. Steinthal & Co. v. Seawans*, 455 F.2d 1290 (D.C. Cir. 1971).

and the GAO opinion are neither arbitrary nor capricious."

If the protestor proceeds first to a Federal court and obtains a judicial determination of the merits of its protest, then it may not obtain a subsequent decision from another forum. The contracting agencies and GAO are bound by the court's decision.¹² The protestor's only recourse is to appeal an adverse lower court opinion to a higher court.¹³

Need to Clarify Authority for Judicial Review of Contract Award Decisions

Three weeks after the *Scanwell* decision, the Supreme Court issued two major opinions bearing on the doctrine of standing to sue, although, again, the cases did not involve offerors for Government contracts. In *Association of Data Processing Service Organizations, Inc. v. Camp*¹⁴ the court stated a plaintiff has standing to challenge administrative action that "has caused him injury in fact, economic or otherwise" if the interest sought to be protected is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" and judicial review has not been precluded.¹⁵ In a companion case, *Barlow v. Collins*,¹⁶ the court commented that "preclusion of judicial review of administrative action adjudicating private

rights is not lightly to be inferred. . . . Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated."¹⁷

These Supreme Court cases have not settled the question of whether offerors on Government contracts may challenge administrative action in the contract award process. Certain courts have subsequently granted standing to protestors.¹⁸ Others have continued to deny standing to offerors based on *Perkins v. Lukens Steel*.¹⁹ The latter have reasoned, in essence, that the Supreme Court has not, unlike the *Scanwell* decision, ruled that any person "aggrieved in fact" by agency action may sue the Government. Rather, these courts contend, the Supreme Court opinions impose the additional requirement that a protestor must show that some Federal statute grants it a legal interest in the procurement process that is entitled to be protected and enforced in a court of law.²⁰ The result of these differing decisions is that award protests may certainly be brought in certain judicial forums, such as the district courts within the District of Columbia Circuit and the Court of Claims, but it is an open question at best in other jurisdictions whether the offeror will be granted standing to sue the Government.

The brief history of judicial involvement in the award protest system shows the potential

¹² 397 U.S. at 166.

¹³ See, e.g., *Ballerina Pen Company v. Kanzig*, 433 F.2d 1204 (D.C. Cir. 1970); *National Helium Corp. v. Morton*, 466 F.2d 650 (10th Cir. 1971). See also *Contractors Assn. of Eastern Pa. v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971).

¹⁴ See *Gary Aircraft Corp. v. United States*, 342 F. Supp. 473, 476-78 (W.D. Tex. 1973) (motion for prelim. injunction denied and complaint dismissed based, in part, on *Perkins v. Lukens Steel Co.*); *Rubber Fabricators, Inc. v. Laird*, No. 71-1889 (4th Cir., Nov. 16, 1971) (District Court ruled bidder had no standing to sue under *Perkins v. Lukens Steel Co.* and denied motion for prelim. injunction; Court of Appeals granted injunct. pending appeal; injunct. dissolved because case rendered moot: Court of Appeals never reached standing issue). See also *Allen M. Campbell Gen. Cons., Inc. v. Lloyd Wood Const. Co.*, 448 F.2d 261, 264 n.5 (5th Cir. 1971) (since *Perkins v. Lukens Steel Co.* "never [has been] judicially overruled or even mentioned" by the Supreme Court in recent standing decisions, we assume without deciding that the question in other contexts is an open one.)

¹⁵ See *Merriman v. Kanzig*, 347 F. Supp. 713, 720-24 (E.D. Pa. 1972) (complaint dismissed for lack of standing because "specific interest of the plaintiff cannot reasonably be considered to be included in the zone of interests to be protected or regulated" by statutes examined); *Gary Aircraft Corp. v. United States*, 342 F. Supp. 473, 476-78 (W.D. Tex. 1973). Protests also have been dismissed on the ground that the agency's decision was committed to agency discretion and not reviewable by a court of law. See *Gary Aircraft Corp.*, supra, 342 F. Supp. at 478; *Hi-Ridge Lumber Company v. United States*, 468 F.2d 462 (9th Cir. 1971); *Pulman, Inc. v. Volpe*, No. 71-2442 (E.D. Pa., Dec. 14, 1971).

¹⁶ *A. G. Schoonmaker Co. v. Raso*, 448 F.2d 728 (D.C. Cir. 1971). The court in a later decision emphasized that "[t]he GAO's decision is not necessarily dispositive, however, and we take occasion to point out that there certainly may be instances where the District Court will find procurement illegality that the GAO failed to recognize, or at any event failed to correct." *M. Strinthal & Co. v. Seemans*, 465 F.2d 1299, 1306 (D.C. Cir. 1971).

¹⁷ It is the policy of GAO "not to render decisions on protests where the material issues are or have been involved in litigation before a court of competent jurisdiction." Comp. Gen. Dec. B-178499, Oct. 8, 1971 (denying reconsideration of 51 Comp. Gen. 165 (1971)). See 51 Comp. Gen. 87 (1971) (reconsideration, B-171782, Sept. 7, 1971, Unpublished); Comp. Gen. Dec. B-171917, May 4, 1971, Unpublished. GAO will consider a protest where protestor has obtained an injunction staying agency action until GAO has adjudicated the protest.

¹⁸ Cases in the Court of Claims may be reviewed by the Supreme Court of the United States, 28 U.S.C. § 1255 (1970). The courts of appeals have jurisdiction of appeals from all final decisions of the district courts, except where a direct review may be had in the Supreme Court, 28 U.S.C. § 1291 (1970). Cases in the courts of appeals may be reviewed by the Supreme Court, 28 U.S.C. § 1254 (1970).

¹⁹ 397 U.S. 160 (1970).

²⁰ 397 U.S. at 162-64.

²¹ 397 U.S. 130 (1970).

value of judicial review of award protests. The more formalized factfinding procedures used by the courts give a protestor the option of obtaining a due process adjudication of its protest. Judicial independence from daily contact with the contract award process allows the courts to provide fresh insights into the workings of that process. The geographical dispersion of the Federal district courts provides easier access to a protest-resolving forum. Finally, the power of the courts to award damages makes the potential for granting effective relief to a protestor greater than is possible from an administrative forum and resolves the dilemma often faced by the administrative forums of terminating a contract.

In view of the present uncertainty regarding the standing of protestors to challenge contract awards in court, we believe consideration should be given to clarifying the statutory basis for court jurisdiction. We agree with the conclusion of the Court of Appeals for the District of Columbia Circuit that injunctive relief should not be granted unless the aggrieved offeror demonstrates that there was *no rational basis* for the agency's decision.²⁷ We also believe that awarding proposal preparation costs as damages for the wrongful rejection of a proposal is appropriate and should be authorized by statute if necessary.²⁸

AVOIDANCE OF PROTESTS

Although award protests serve a necessary and useful function in Government procurement, the annual number of protests is rising to a level that potentially could have an adverse effect on the procurement process. In fiscal 1972, the 1,227 protests disposed of by GAO represented a 16 percent increase over the number dealt with the previous year.²⁹ Sim-

ilar statistics cannot be ascertained regarding protests that are lodged in the agencies and never brought to GAO or the courts, but it is clear from the sampling of statistics we have received that the number of these protests also is rising each year.³⁰ In fairness to protestors and to maintain the integrity of the procurement system, it is important to cope with this heavier workload by devising means to identify and remove the causes of these complaints.

Better Debriefing Procedures

Recommendation 18. Improve contracting agency debriefing procedures.

One agency study has indicated that a certain portion of award protests are made unnecessarily because they are based on incomplete or erroneous information concerning the rationale for making the administrative decisions on which those protests are based.³¹ Often, after full information is available, the protests are withdrawn. The study acknowledges that a failure to communicate adequately with sellers during debriefing has resulted in protests.³² The importance of having adequate debriefing procedures established in the basic procurement statutes is discussed in Volume I, Part A, Chapter 3.

Pre-Award Protest Procedure

Recommendation 19. Establish a pre-award protest procedure in all contracting agencies.

We also recommend that all contracting agencies establish a pre-award protest procedure aimed at bringing complaints quickly to the attention of management officials before they are channeled into the independent award protest-resolving forums.

²⁷ See Study Group 4, *Final Report*, Feb. 1972, vol. II, pp. A-36-A-37.

²⁸ Department of the Air Force, Air Force Systems Command (AFSC), *He. AFSC Study on Protests*, Apr. 29, 1971 (unpublished).

²⁹ *Ibid.*

³⁰ *M. Steinthal & Co. v. Seomana*, 455 F.2d 1299 (D.C. Cir. 1971).

³¹ Several courts have indicated that the Court of Claims may award proposal preparation costs as damages. See *M. Steinthal & Co. v. Seomana*, 455 F.2d 1299 (D.C. Cir. 1971); *Kree India, Inc. v. United States*, 192 Cl. Ct. 773, 428 F.2d 1233 (1970); *Continental Business Enterprises, Inc. v. United States*, 452 F.2d 1016 (Cl. Ct. 1971). The APA does not authorize monetary relief. *Hooper v. United States*, 331 F. Supp. 1046 (D. Conn. 1971). See 5 U.S.C. § 706 (1970). It is therefore questionable, if standing is based upon the APA, whether district courts may award proposal preparation costs. Statutory authorization may be required in this instance.

³² GAO disposed of 1,054 cases in fiscal 1971. See Appendix A, p. 77.

GAO Review of Agency Award Protest Procedures and Practices

Recommendation 20. Conduct periodic reviews by GAO of agency award protest procedures and practices.

GAO conducts hundreds of independent audits and reviews of executive branch programs that are "intended to give the Congress, as well as the agency heads, an objective appraisal of the operations of the agency or activity covered which . . . need congressional or executive branch attention."²² However, GAO does

not regularly conduct comprehensive reviews of agency award protest procedures and practices.

We believe that periodic, objective appraisal of agency award protest procedures and practices is desirable as a means of calling attention to management practices that must be corrected if protests are going to be reduced. Such a regular review would assist in achieving the comprehensive and coordinated set of award protest procedures that the award protest system needs.

²² Statement of Hon. Elmer B. Staats, Comptroller General of the United States, *Hearings on the Capability of GAO to Analyze*

and Audit Defense Expenditures Before the Subcomm. on Executive Reorganization of the Senate Committee on Government Operations, 91st Cong., 1st Sess., Exhibit 1, at 29 (1969).

APPENDIX D.—COURT CASES ON THE CONSTITUTIONALITY OF GAO'S BID
PROTEST FUNCTION

1

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY
3 Civil No. 85-1064

4 AMERON, INC.,

MEMORANDUM OPINION

5 Plaintiff,

6 v.

7 U.S. ARMY CORPS OF ENGINEERS,
8 LT. COL. MICHAEL K. COLLMAYER,
9 CONTRACTING OFFICER
UNITED STATES OF AMERICA, and
SPINIELLO CONSTRUCTION COMPANY,

10 Defendant.

11 Newark, New Jersey
12 March 27, 1985

13 BEFORE: The Honorable HAROLD A. ACKERMAN, U.S.D.J.
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DENNIS K. WEBSTER, CSR, BOX 397, NEWARK, N.J. 201-643-5720

1 THE COURT: Had the conscientious secretary who started
2 this controversy with one little dab of correctional fluid known
3 what would ensue, I wonder whether she would have ever taken
4 that first typing course.

5 The plaintiff in this action, Ameron, Inc., was the
6 lowest bidder on a pipe-cleaning project for West Point Military
7 Academy. Ameron's bid was \$1,033,000. The next lowest bid was
8 submitted by Spiniello Construction Company with a bid of
9 \$1,255,000. Ameron's bid was, however, rejected by the Army
10 Corps of Engineers as "nonresponsive" and the contract was
11 awarded to Spiniello.

12 After filing protests with the Corps and the U.S.
13 General Accounting Office (GAO), Ameron applied to this court
14 for an Order to Show Cause why defendants should not be
15 preliminarily restrained from performing the contract in
16 question until plaintiff's protest is decided by the GAO, and
17 for temporary restraints pending the Order to Show Cause.

18 On March 4, 1985, I issued an Order to Show Cause, but
19 denied the restraints. On March 7, 1985, Ameron returned to
20 this court with an amended request for temporary restraints,
21 bringing to the court's attention the newly enacted Competition
22 in Contracting Act, specifically, 31 U.S.C. Section 3351(a) (1)
23 (1984). A temporary restraining order was entered and
24 defendants were ordered to appear on March 13, 1985 for a
25 hearing.

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1 Following issuance of the TRO, motions to intervene
2 were received from the Speaker and Bipartisan Leadership Group
3 of the House of Representatives and from the U.S. Senate. Leave
4 was also sought by the Comptroller General of the United States
5 to file a brief of amicus curiae. These motions were all
6 granted because of the importance of the issues presented, the
7 interest of those parties therein, and the timeliness of their
8 application. The Supreme Court has also stated "that Congress
9 is the proper party to defend the validity of a statute when
10 [the Executive Branch argues] that the statute is inapplicable
11 or unconstitutional." Immigration and Naturalization Service v.
12 Chadha, 103 S.Ct. 2764, 2778 (1983). The extensive briefing
13 done by these parties has been a great help to the court.

14 On March 13, 1985, oral argument was held on these
15 issues, and I ordered a 10-day extension of the original
16 restraining order for good cause shown pursuant to Rule 61 of
17 the Federal Rules of Civil Procedure. I have now had an
18 opportunity to review all the briefs and affidavits submitted by
19 the parties and have researched the significant constitutional
20 issues raised by this controversy, and I am ready to make my
21 findings of fact and conclusions of law pursuant to Rule 61
22 of the Federal Rules of Civil Procedure. I note, however, that
23 time constraints have prevented me from dealing with this
24 problem in a more thorough and scholarly manner.

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FINDINGS OF FACT

The U.S. Army Corps of Engineers, New York District, invited bids for a project known as Raw Water Line Improvements. The Project entails cleaning and lining underground pipes which feed the reservoir at the United States Military Academy at West Point, New York.

The bids were opened on January 9, 1985, and, as stated before, Ameron submitted the lowest bid. After the bids were opened, upon request of the Corps, Ameron furnished a letter on January 10th confirming its bid. Ameron also furnished bank references to the Corps and a subcontractor's plan by letter of January 21, 1985. Ameron's subcontract plan was approved by the Corps on January 28th. A letter was drafted for signature of defendant, Michael R. Collumeyer, Deputy District Engineer of the Corps, accepting Ameron's bid for the contract.

When these bids were reviewed by Lorraine Lee, attorney-advisor with the Office of Counsel, it was determined that plaintiff's bid was defective because the penal sum contained in the bid bond had been altered. The numerals "1" and "000" in the millions and the thousands boxes designating the maximum amount of the bond were typed in over white typewriting correction fluid.

Based upon this revelation and her knowledge of the law, this bid was deemed nonresponsive and rejected because the

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1 alteration was not accompanied by any indication that the surety
2 had consented to be bound to this change.

3 Indeed, in Ms. Lee's affidavit, she stated that a
4 question was raised as to whether the figure in the million(s)
5 box was added before or after the surety's signature. Because
6 of Ameron's failure to submit a responsive bid as required, its
7 bid was rejected and the contract was awarded to Spiniello
8 Construction Company, the next lowest bidder.

9 By letter dated February 20, 1985, the U.S. Corps of
10 Engineers articulated its reasons for rejecting plaintiff's bid
11 as follows:

12 "The bid bond submitted by your firm has the penal sum
13 of the bond typed over in white typing correction fluid. Since
14 the bond was not accompanied by any evidence that the surety
15 consented to this alteration, your bid is hereby rejected as
16 non-responsive."

17 The bond did indeed contain a figure which was later
18 whited out and changed, but this was done by Jan Keating, an
19 employee of Ameron, before the bid bond was signed. When Ms.
20 Keating originally typed the bond, she typed \$1.2 million as the
21 maximum amount of the bond. That figure was given to her on her
22 worksheet as the estimated contract price to be submitted by
23 Ameron. Before removing the bid bond from her typewriter, she
24 remembered that she had been asked to type \$3,000,000 as the
25 maximum amount of the bond. Therefore, using a small sheet of

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DENNIS R. WEBSTER, CSR, BOX 197, NEWARK, N.J. 201-641-5720

1 correct-o-type whitening material, she struck over the "1" and "2"
2 and typed "3" where the "1" was, and typed a "0" where the "2"
3 was. The bond was then signed by Helen Smith, attorney-in-fact
4 for Federal Insurance Co., and by Scott P. Biondi, Eastern Sales
5 Manager of Ameron. Neither of them noticed the alteration in
6 the bond.

7 On Friday, March 1, Ameron's attorneys filed a protest
8 with the United States General Accounting Office. The protest
9 was sent by electronic means and was received by GAO on March 1.
10 A copy of the protest was also sent by telecopier to the Corps
11 in New York City on March 1, 1985. Despite this notice and
12 notice given verbally to Ms. Lee on March 1 of Ameron's protest
13 and request that the Notice to Proceed not issue, the Corps
14 issued its Notice to Proceed to Spiniello on March 4.

15 On March 7, 1985, plaintiff applied for and obtained an
16 Amended Order to Show Cause stating that pursuant to 31 U.S.C.
17 Section 3553(d)(1), the U.S. Army Corps of Engineers was
18 required to suspend activities related to that contract during
19 the pendency of the protest before the General Accounting
20 Office. Ameron contends that the court's rejection of its bid
21 was arbitrary, unreasonable and contrary to law and applicable
22 regulations. It further asserts that the public will suffer
23 irreparable injury if the contract to Spiniello is not enjoined
24 or set aside.

25 The United States contends that the decision of the

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1 U.S. Army Corps of Engineers rejecting plaintiff's bid as
 2 nonresponsive was clearly rational and lawful, and must
 3 therefore not be disturbed by this court. It also contends that
 4 the stay provisions of 31 U.S.C. Section 3553 relied upon by
 5 this court in issuing its restraining order are
 6 unconstitutional.

7 I now turn to these contentions.

8 Before any discussion of the numerous issues briefed by
 9 the parties, I note that this case is presently before me on a
 10 motion for a preliminary injunction.

11 In order to prevail in its request for preliminary
 12 injunctive relief, Ameron must meet its burden of showing the
 13 following: (1) that there is a reasonable likelihood of success
 14 on the merits of this litigation; (2) that it will suffer
 15 irreparable injury unless the requested relief is granted; (3)
 16 that the granting of relief will not substantially harm other
 17 interested parties; and (4) that, if the relief is granted, the
 18 public interest will not be harmed. Cerro Metal Products v.
 19 Marshall, 620 F.2d 964, 972 (3d Cir. 1980); Continental Group
 20 Inc. v. Amoco Chemical Corp., 614 F.2d 351, 356-57 (3d Cir.
 21 1980).

22 Plaintiff's first argument is that the Army Corps of
 23 Engineers acted as a matter of law in rejecting their bid based
 24 on a typographical correction. They contend that the legal
 25 principle is firmly established that a typographical correction

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1 of a contract made before its execution and delivery does not
 2 invalidate the contract. Plaintiffs also contend that the
 3 typographical correction did not violate any rule, regulation,
 4 law or bid requirement.

5 This court's role in this matter is, however, not that
 6 of a court seeking to review a contract, nor is it a
 7 determination of whether I would have awarded the bid to Ameron
 8 or not. This court's role in reviewing agency procurement
 9 decisions is extremely limited. The Third Circuit stated in
 10 Princeton Combustion Laboratories v. McCarthy, 674 F.2d 1015 at
 11 1021 (3d Cir. 1980):

12 "We hold that as a matter of law, once the district
 13 court ... determines that an agency's procurement decision is
 14 rational, its inquiry is at an end: the district court must
 15 deny the motion for a preliminary injunction"

16 Ameron must make a threshold showing that an agency's
 17 decision is clearly illegal, or at least irrational, before a
 18 court can interfere with the decision-making process. As the
 19 Third Circuit has stated:

20 "A showing of clear illegality is an appropriate
 21 standard to impose on an aggrieved bidder who seeks judicial
 22 relief."

23 Sea-Land Service, Inc. v. Brown, 600 F.2d 429, 434 (3d Cir.
 24 1979).

25 Thus, I turn to an examination of the basis for

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defendant's decision to reject Ameron's bid. The Corps deemed plaintiff's bid nonresponsive because the alteration of the bid bond was not accompanied by any indication that the surety had consented to be bound by the change. The regulations of the Corps, and decisions of the Comptroller General, consider the bid bond to be a material part of a bid. Case authority from the office of the Comptroller General states that a bid is nonresponsive where it is accompanied by an altered bid bond without evidence of the surety's consent to be bound by the change. See, e.g., Montgomery Elevator Co., 2-210782, 83-1 CPD para. 400 (1983); Baucom Janitorial Service, Inc., 82-1 CPD para. 356 (1982).

The Comptroller General in Montgomery Elevator explained the reasons for such a regulation:

"An invitation's requirement for a submission of a bid bond involves a matter of responsiveness with which there must be compliance at bid opening and not later. The reason, in part, is that if the situation were otherwise, a bidder who failed to submit a valid bond could decide after bid opening whether or not to cause its bid to be rejected by submitting or refusing to submit the bond. See 38 Comp. Gen. 532 (1959).

"The submission of a materially altered bond can have the same effect as the failure to submit a bond altogether, because under surety law no one incurs a liability to pay a debt or to perform a duty for another unless expressly agreeing to be

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1 bound. An alteration in the bond thus raises a question whether
2 the surety agreed to the altered terms. See 44 Comp. Gen. 495
3 (1965). A material alteration to a bond, such as in the penal
4 amount, made without the surety's consent, discharges the surety
5 from liability, 3A C.J.S. Alteration of Instruments Section 60
6 (1973), and a material alteration thus necessarily raises a
7 question whether the surety has any obligation under the bond."

8 The Comptroller General, in responding to arguments
9 substantially similar to those made by plaintiff here, stated:

10 "The protester's argument would permit the
11 circumvention of the principle that a bidder should not be able
12 to determine after bid opening whether to have its bid rejected
13 by either submitting or refusing to submit a valid bond. As
14 this case pointedly shows, a bidder's own employee may have a
15 power-of-attorney to execute bonds on behalf of the surety or
16 may be in a position to influence the surety's decision whether
17 or not to disavow an altered bond.

18 "The purpose of a bond is to secure the liability of a
19 surety to the government in accordance with the terms of the
20 bond, so that the question presented in cases where bonds do not
21 comply with invitation requirements is whether the government
22 obtains the same protection in all material respects under the
23 bond actually submitted as it would under a bond complying with
24 the requirement. See General Ship and Engine Works, Inc., 55
25 Comp. Gen. 422 (1975), 75-2 CPD 269. As stated above, a surety

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1 is discharged from liability on a bond if a material term of the
2 bond was altered without its consent, and an altered bond,
3 without contemporaneously-furnished evidence that the surety
4 agreed to the altered terms, simply does not afford the
5 government the desired protection. The burden on the bidder to
6 submit evidence of agreement, or to prepare a new bond, is
7 slight, and is not enough to justify endorsing a situation with
8 the potential for bidders to submit altered bonds and then
9 determine after bid opening whether to have their bids
10 rejected."

11 It was based on her knowledge of the considerations
12 described by the Comptroller General and the general procurement
13 law embodied in the Montgomery Elevator decision and others that
14 Ms. Lee determined that Ameron's bid was nonresponsive.

15 I simply cannot find that such a determination is
16 irrational. The decision to reject Ameron's bid was clearly
17 justified by rational, established principles. Thus, my inquiry
18 concerning the merits of plaintiff's protest must be at an end.
19 See Princeton Combustion at 1022. As plaintiff has not shown a
20 likelihood of success on the merits in this regard, there is no
21 need to turn to the question of irreparable injury at this
22 point.

23 I have, however, been called on to review not only the
24 merits of plaintiff's protest, but the procedure under which
25 that protest is to be evaluated. Ameron has asked this court to

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stay further action on a government contract pending a recommendation on plaintiff's bid protest by the GAO based on the Competition in Contracting Act ("CICA"), Pub. L. No. 98-369, 98 Stat. 494 (1984). CICA was enacted as Title VII of the Deficit Reduction Act of 1984, Sections 2701-2753. 130 Cong. Rec. S 8422, H 7128 (June 27, 1984).

CICA resulted from more than a decade of study of waste and inefficiency in government procurement. See, e.g., Commission on Government Procurement, Report of the Commission on Government Procurement (1972) (submitted to Congress pursuant to Pub. L. No. 91-129 (1969)); H. R. Rep. No. 1157, 98th Cong. 2d Sess. 10-17 (1984).

The Congress determined that effective and efficient government procurement required legislation "to increase the use of competition in government contracting and to impose more stringent restrictions on the awarding of noncompetitive-sole-source-contracts." H. R. Conf. Rep. No. 661, 98th Cong., 2d Sess. 1421 (1984), reprinted in 1984 U.S. Code Cong. & Ad News, Pt. 6B at 751, 1415.

Subtitle D of CICA, 98 Stat. 1199-1203, established a statutory procurement system "which codifies and strengthens the bid protest function currently in operation at the General Accounting Office." H. R. Conf. Rep. No. 661, supra, at 1435, including an expeditious procedure for the Comptroller General to decide protests filed by interested parties to solicitations

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1 for proposals for government procurement contracts and to awards
2 or prospective awards of such contracts. 31 U.S.C.A. Section
3 3551-3552.

4 The Comptroller General is to resolve protests by
5 issuing a decision "whether the solicitation, proposed award, or
6 award complies with statute and regulation." 31 U.S.C.A.
7 Section 3554(b)(1). If the Comptroller General upholds a
8 protest, he issues recommendations to the contracting agency as
9 to whether the agency should recompute the contract, terminate
10 the contract, award a lawful contract, or take other actions to
11 promote compliance with the law. *Id.* The Comptroller General's
12 views are recommendatory only. Contracting agencies are
13 required to report to the Comptroller General, for transmittal
14 to Congress, instances in which they failed fully to implement
15 the Comptroller General's recommendations. *Id.*, Section
16 3554(e). In addition, the Comptroller General may award a
17 successful protester its costs of pursuing the protest,
18 including attorneys' fees, and of preparing the bid and
19 proposal. *Id.*, Section 3554(e).

20 The statute establishes a timetable for the Comptroller
21 General's resolution of protests, generally within 90 working
22 days, unless circumstances warrant use of an "express option"
23 limited to 45 calendar days, or require a period longer than 90
24 working days. *Id.*, Sections 3553(b), 3554(a)(1) and (2). The
25 Comptroller General may dismiss a frivolous protest as soon as

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1 he determines that it "does not state a valid basis for
2 protest." Id., Section 3554(a)(3).

3 CICA includes automatic "stay provisions." Pending the
4 resolution of a bid protest, the contracting agency is
5 prohibited from awarding the contract, or, if the contract has
6 been awarded, from permitting performance by the contractor,
7 Id., Sections 3553(c)(1), 3553(d)(1), unless the head of the
8 agency makes "a written finding that urgent and compelling
9 circumstances which significantly affect the interests of the
10 United States will not permit waiting for the decision of the
11 Comptroller General," or, in the case of an awarded contract,
12 "that performance of the contract is in the best interest of the
13 United States," Id., Sections 3553(c)(2), 3553(d)(2).

14 When President Reagan signed CICA into law, he
15 "object[ed] to certain provisions that would unconstitutionally
16 attempt to delegate to the Comptroller General ... duties and
17 responsibilities that ... may be performed only by officials of
18 the Executive Branch." 20 Weekly Comp. Pres. Doc. 1037 (July
19 18, 1984). The President "instruct[ed] the Attorney General to
20 inform all Executive Branch agencies as soon as possible with
21 respect to how they may comply with the provisions of this bill
22 in a manner consistent with the Constitution." Id.

23 The advice of the Attorney General is contained in an
24 October 17, 1984 memorandum from the Office of Legal Counsel of
25 the Department of Justice that concludes that the bid protest

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1 stay provisions are unconstitutional and should not be enforced
2 by executive agencies. The memorandum does not contest the
3 constitutionality of the automatic stay provisions themselves,
4 but only the fact that the Comptroller General's resolution of a
5 protest would operate to lift the stay, potentially earlier than
6 or later than 90 days. *Id.* at 15. The Department analogized
7 this variance in the length of stays to a "legislative veto"
8 provision. *Id.* Based upon its conclusion that the authority to
9 vary the length of the stay was inseverable from the stay
10 provision itself, the Department opined that the entire stay
11 provision should be invalidated. *Id.* at 16-18.

12 The Attorney General notified the President of the
13 Senate and the Speaker of the House of Representatives on
14 November 31, 1984, pursuant to the requirements of Section
15 203(a) of Pub. L. No. 98-411, 98 Stat. 1545, that the Department
16 of Justice had instructed federal agencies not to execute the
17 bid protest provisions. Based upon the opinion of the
18 Department of Justice, the Director of the Office of Management
19 and Budget instructed all executive agencies on December 17,
20 1984 to "proceed with the procurement process as though no
21 [stay] provision were contained in the Act." OMB Bulletin No.
22 85-6, at 2.

23 The bid protest provisions of CICA became effective on
24 January 15, 1985, and plaintiff attempts to enforce the stay
25 provision of that act, 31 U.S.C. Section 3553(d) (1984), by

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1 bringing this preliminary injunction. The defendants have
2 resisted application of CICA's stay provisions in this regard,
3 contending that this provision is unconstitutional. However,
4 defendants request the court to avoid deciding the
5 constitutionality of the Act, contending there is an alternative
6 ground for decision.

7 It is axiomatic that a court will not decide a
8 constitutional question where alternative grounds for the
9 decision exist. See, e.g., Clay v. Sun Ins. Office Limited, 363
10 U.S. 207 (1960); Alma Motor Co. v. Ticken-Detroit Axle Co., 329
11 U.S. 129 (1947); Lamb Enterprises, Inc. v. City of Erie, 206
12 F.Supp. 665 (W.D. Pa. 1967), aff'd 396 F.2d 742 (3d Cir. 1968).

13 I turn then to defendant's proposed alternative ground
14 for decision.

15 31 U.S.C. Section 3553(d)(1) provides for a suspension
16 of any activity related to the performance of a contract where a
17 protest has been filed in a timely fashion. This in effect
18 stays further activity related to that particular procurement.
19 Defendants contend, however, that pursuant to General Accounting
20 Office Reg. 21.9(a), the stay pursuant to 31 U.S.C. Section
21 3553(d)(1) is lifted unless the court assuming jurisdiction of
22 the protest specifically requests a decision by the General
23 Accounting Office. That regulation provides as follows:

24 "The General Accounting Office will dismiss any protest
25 where the matter involved is the subject of litigation before a

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1 court of competent jurisdiction, unless the court requests a
2 decision by the General Accounting Office. The General
3 Accounting Office will dismiss any protest after the matter
4 involved has been decided on the merits by a court of competent
5 jurisdiction.

6 Defendant contends that it is clear from the above
7 provision that once this court declined to request that GAO
8 render a decision, the protest must be dismissed inasmuch as the
9 above language is mandatory. That being the case, the stay
10 under CICA is automatically lifted because there is no longer a
11 protest pending before the GAO.

12 This reasoning ignores both the present posture of this
13 case before the court and the purpose of GAO Reg. 21.9(a).

14 I am not ruling in any way on the merits of plaintiff's
15 protest. Both 31 U.S.C. 3553 and the law expressed in
16 procurement decision cases such as Princeton Combustion, supra,
17 and Sea-Land Service, supra, evidence a preference for allowing
18 the Comptroller General and the GAO to decide the merits of a
19 protest, and not the court. Reg. 21.9(a) envisions the GAO
20 dismissing a protest after the matter "has been decided on the
21 merits by a court of competent jurisdiction." I have not ruled
22 and will not make any ruling on the merits of plaintiff's
23 protest.

24 Reg. 21.9(a) sensibly only refers to a decision on the
25 merits as the regulation is based on an election of remedies

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1 principle: if a protester chooses to litigate the merits in
2 district court, instead of before the General Accounting Office,
3 the GAO will not expend its resources issuing useless
4 recommendations. The regulation does not contemplate that
5 contracting agencies would, by deliberately violating CICA,
6 force protesters to file suit to obtain compliance with the CICA
7 provisions.

8 Accordingly, the regulation does not apply to
9 situations such as this in which there has been no voluntary
10 election of remedies. The contrary interpretation would
11 insulate executive agencies' disregard of CICA from judicial
12 review.

13 The decisions of the Comptroller General cited by
14 defendant to support its interpretation of Reg. 21.9 stress that
15 the GAO will not consider the merits of a protest where the
16 material issues are before a court and that court has not
17 expressed interest in obtaining GAO's views. See, e.g.,
18 Douglas Industries, Inc., B-215727, 84-2 CPD, para. 212 (1984);
19 Isule Maintenance Corp., B-212753, 84-1 CPD, para. 128.

20 It is clear from the posture of this case that this
21 court is interested in obtaining GAO's views on this matter.
22 The court would not issue a stay pending review of the merits by
23 GAO unless the court expected the GAO to render a decision in
24 accordance with 31 U.S.C. Section 3551 et. seq.

25 Moreover, under the terms of 31 U.S.C. Section 3552,

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1 the duty to decide bid protests that CICA imposes upon the
2 Comptroller General is mandatory. The Comptroller General does
3 not have the statutory authority to dismiss a protest unless it
4 "is frivolous or ..., on its face, does not state a valid basis
5 for protest." 31 U.S.C. Section 3554(a)(3). Thus, to the
6 extent that 4 C.F.R. Section 21.9 could be interpreted to
7 require the Comptroller General to dismiss a protest that has
8 not been withdrawn, merely because of the filing of a suit such
9 as this, the provision would be contrary to law and could not be
10 applied.

11 Thus, Reg. 21.9 does not obviate the need for this
12 court to decide the constitutional issue presented.

13 There is also no reason to treat this case as a suit
14 for injunctive relief under the Administrative Procedure Act
15 ("APA").

16 The plaintiff's CICA claim takes precedence over
17 plaintiff's APA claim, because the APA authorizes judicial
18 review of only those "agency action[s] for which there is no
19 other adequate remedy in a court." 5 U.S.C. Section 704 (1982).
20 As long as plaintiff's protest is pending before the Comptroller
21 General, it has an adequate remedy through the court's
22 enforcement of CICA. Therefore, unless plaintiff were to
23 dismiss its CICA claim, or the court were to invalidate CICA,
24 the merits of plaintiff's protest would not properly be before
25 the court, but only before the Comptroller General.

1 In the statutorily required notification to the Senate
2 that the Department of Justice was instructing executive
3 agencies not to comply with the stay provisions of CICA, the
4 Attorney General of the United States stated: "[T]he
5 Department's decision to advise Executive Branch agencies not to
6 execute the unconstitutional provisions will best assure a rapid
7 and definitive judicial resolution of these constitutional
8 issues. Any bid protester who is aggrieved by an Executive
9 agency's failure to comply with these provisions may raise the
10 constitutional issues for judicial resolution."

11 Letter from Attorney General William French Smith to
12 Vice-president George Bush, November 21, 1984, at 10. The
13 Acting Deputy Attorney General recently reiterated that the goal
14 of achieving "a speedy judicial resolution of this question"
15 underlay the Department's directive that agencies disobey the
16 law. See, Prepared Statement of Acting Deputy Attorney General
17 D. Lowell Jensen Before the Subcomm. on Legislation and National
18 Security of the House Comm. on Government Operations Concerning
19 competition in Contracting Act of 1984, March 7, 1985, at 10.

20 In spite of these assurances, the litigating posture of
21 the executive defendants in this case seems to be one designed
22 to avoid a judicial resolution of the lawfulness of agencies'
23 conduct in continuing to disobey the law. This court rejects
24 defendants' attempt to insulate their actions from judicial
25 review. It is emphatically the province and duty of the

1 judicial Department to say what the law is." Marbury v.
 2 Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

3 I turn then to the question of whether the provision of
 4 CICA which allows the Comptroller General to lift stays by
 5 rendering decisions on bid protests is constitutional.

6 I note at the outset that consideration of whether "to
 7 declare an Act of Congress unconstitutional ... is the gravest
 8 and most delicate duty that this Court is called on to
 9 perform." Blodgett v. Holden, 275 U.S. 142, 147-48 (1927)
 10 (Holmes, J., concurring). "Every possible presumption is in
 11 favor of the validity of a statute." Adwender v. Tennessee
 12 Valley Authority, 297 U.S. 288, 355 (1936) (Brandeis, J.,
 13 concurring) (quoting The Sinking Fund Cases 99 U.S. 700, 718
 14 (1878)).

15 Defendant contests the CICA provision at issue because
 16 it vests in the Comptroller General, a legislative official,
 17 executive powers which result in the alteration of legal rights,
 18 duties and relations of persons outside of the legislative
 19 branch and is therefore inconsistent with the separation of
 20 powers principle. INS v. Chaqha, supra, at 2764.

21 Plaintiff contends that CICA is constitutional because
 22 the Comptroller General is an "Officer of the United States" as
 23 that phrase is used in the Appointments Clause, Art. II, Section
 24 2, cl. 2, of the Constitution. Thus, he may perform all duties
 25 that Congress may statutorily assign officers of the United

1 States.

2 Before turning to the law concerning the separation of
3 powers and the roles of executive and legislative officers, I
4 think it would be helpful to quote extensively from Judge
5 Holtzoff's opinion in United States v. Stewart, 234 F.Supp. 94
6 (D.D.C. 1964), aff'd 339 F.2d 753 (1964), who I think described
7 the office of the Comptroller General very correctly and
8 thoroughly:

9 "In this connection it seems desirable to give some
10 consideration to the role of the Comptroller General in a
11 situation of the type presented here. The Comptroller General
12 is the head of the General Accounting Office, 31 U.S.C. Section
13 41. Unlike heads of most departments and establishments of the
14 government, he occupies a dual position and performs a two-fold
15 function. First, he makes investigations of matters relating to
16 the receipt, disbursement and application of public funds, and
17 reports the results of his scrutiny to the Congress with
18 appropriate recommendations. In addition, he pursues
19 investigations that may be ordered by either House of Congress,
20 or by any committee of either House, in matters relating to
21 revenue, appropriations or expenditures, 31 U.S.C. Section 51.

22 "In forming these functions, the status of the
23 Comptroller General is that of an officer of the legislative
24 branch of the government. The Congress has comprehensive
25 authority to undertake investigations in aid of legislation, or

1 in connection with the appropriation of funds. Investigations
2 are an aid to legislation and to the making of appropriations
3 and are therefore auxiliary to the basic functions of the
4 Congress. The Congress may conduct investigations either
5 through committees or through an official such as the
6 Comptroller General.

7 "The Comptroller General has also a second status as
8 the chief accounting officer of the government. His second
9 principal function is that of approval or disapproval of
10 payments made by government departments and other agencies, as
11 well as well as of settling and adjusting accounts in which the
12 government is concerned, 31 U.S.C. Section 71. This is an
13 executive function, and in performing it the Comptroller General
14 acts as a member of the Executive Branch of the government. The
15 dual status of the General Accounting Office is not anomalous,
16 for many regulatory commissions fulfill in part a legislative
17 function and in part carry out executive duties, *Humphrey's*
18 *Executor v. United States*, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed.
19 1611. Cf. *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71
20 L.Ed. 160. Thus we have developed in comparatively recent years
21 a fourth type of government agency, -- one that combines two
22 kinds of basic powers." *Stewart* at 99-100.

23 In turning to the separation of powers issue, I repeat
24 Justice Burger's statement in *INS v. Chadha*, *supra*, at 2781:

25 "If the principle of separation of powers was not simply

1 an abstract generalization in the minds of the Framers: it was
2 woven into the documents that they drafted in Philadelphia in
3 the summer of 1787." Buckley v. Valeo, supra, 424 U.S., at 124,
4 95 S.Ct., at 604. Just as we relied on the textual provision of
5 Art. II, Section 2, cl. 2, to vindicate the principle of
6 separation of powers in Buckley, we find that the purposes
7 underlying the Presentment Clauses, Art. I, Section 7, cls. 2,
8 3, and the bicameral requirement of Art. I, Section 1 and
9 Section 7, cl. 2, guide our resolution of the important question
10 presented in this case. The very structure of the articles
11 delegating and separating powers under Arts. I, II and III
12 exemplify the concept of separation of powers."

13 And at p. 2754: "The Constitution sought to divide the
14 delegated powers of the new federal government into three
15 defined categories, legislative, executive and judicial, to
16 assure, as nearly as possible, that each branch of government
17 would confine itself to its assigned responsibility. The
18 hydraulic pressure inherent within each of the separate branches
19 to exceed the outer limits of its power, even to accomplish
20 desirable objectives, must be resisted.

21 "Although not 'hermetically' sealed from one another,
22 Buckley v. Valeo, supra, 424 U.S., at 121, 95 S.Ct., at 583, the
23 powers delegated to the three branches are functionally
24 identifiable. When any branch acts, it is presumptively
25 exercising the power the Constitution has delegated to it. See

1 Hampton & Co. v. United States, 276 U.S. 394, 406, 48 S.Ct. 348,
2 351, 72 L.Ed. 624 (1928)."

3 As the determinative issue in determining whether the
4 Comptroller General is violating the doctrine of separation of
5 powers in carrying out his duties under CICA is whether the
6 Comptroller General is a legislative or an executive officer, I
7 turn to the seminal cases on that question.

8 In Buckley v. Valeo, 424 U.S. 1 (1975), the U.S.
9 Supreme Court in reviewing the constitutionality of the
10 appointment process of the Federal Election Commission reviewed
11 at great length the nature of legislative and executive
12 functions, and what was constitutionally required of an officer
13 who carried out executive functions. The Court first quoted in
14 full the Appointment Clause, Art. II, Section 2, cl. 2 of the
15 Constitution, and then stated: "We think its fair import is
16 that any appointee exercising significant authority pursuant to
17 the laws of the United States is an 'Officer of the United
18 States,' and must, therefore, be appointed in the manner
19 prescribed by Section 2, cl. 2, of that Article." Buckley at
20 126.

21 The Court, after deciding that any officer who is
22 carrying out executive duties must be appointed by the
23 Executive, invalidated part of the Federal Election Campaign Act
24 of 1971's provisions, because some of the members of the
25 Commission who were exercising law enforcement functions were

1 appointed by Congress and not the Executive. The court in
2 dicta, explicitly approved the Comptroller General's functioning
3 as an executive officer, stating: "Appellee Commission has
4 relied for analogous support on the existence of the Comptroller
5 General, who as a 'legislative officer' had significant duties
6 under the 1971 Act. Section 308, 86 Stat. 16. But irrespective
7 of Congress's designation, Cf. 31 U.S.C. Section 65(d), the
8 Comptroller General is appointed by the President in conformity
9 with the Appointments Clause. 31 U.S.C. Section 42." Duckley
10 at p. 128 fn 165.

11 The court distinguished the constitutionality of giving
12 legislative officers executive duties from the constitutional
13 practice of giving executive officers legislative powers. The
14 Court cited Springer v. Philippine Islands, 277 U.S. 189 (1928),
15 in which it was said:

16 "Not having the power of appointment, unless expressly
17 granted or incidental to its powers, the legislature cannot
18 engraft executive duties upon a legislative office, since that
19 would be to usurp the power of appointment by indirection;
20 though the case might be different if the additional duties were
21 devolved upon an appointee of the executive." Id., at 202.
22 Duckley at 136-137.

23 The functions of the Comptroller General in ensuring
24 that contracts are awarded in accordance with the law is then
25 constitutional as the Comptroller General is appointed by the

Executive and therefore may exercise law enforcement functions.

The statutory scheme challenged here by defendants is substantially similar to that challenged in Humphrey's Executor v. U.S., 295 U.S. 602 (1935). In that case President Roosevelt fired the Commissioner of the Federal Trade Commission before his tenure had statutorily expired. The executors of his estate had brought suit to recover the income not paid to Humphrey from the point of his firing until the statutory expiration of his term. The Justice Department opposed Humphrey, urging that as Humphrey performed functions such as the resolution of claims against the government -- functions that may constitutionally only be performed by officials appointed by the Executive -- then Humphrey must also be subject to removal by the Executive. This attempt to tie the appointment and function of an officer into the right of removal is also attempted here by defendants.

The Court in Humphrey's Executor found the FTC Commissioner's quasi-judicial and quasi-legislative role constitutional, stating at p. 629:

"We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate

1 incident, power to fix the period during which they shall
2 continue in office, and to forbid their removal except for cause
3 in the meantime. For it is quite evident that one who holds his
4 office only during the pleasure of another, cannot be depended
5 upon to maintain an attitude of independence against the
6 latter's will."

7 The court then described the FTC in terms that I find
8 directly on point for the determination of the GAO's status:

9 "The commission is to be nonpartisan; and it must, from
10 the very nature of its duties, act with entire impartiality. It
11 is charged with the enforcement of no policy except the policy
12 of the law. Its duties are neither political nor executive, but
13 predominantly quasi-judicial and quasi-legislative. Like the
14 Interstate Commerce Commission, its members are called upon to
15 exercise the trained judgment of a body of experts 'appointed by
16 law and informed by experience.'" Id. at 624 (citations
17 omitted).

18 The court explicitly approved of the Congressional
19 creation of "a body of experts who shall gain experience by
20 length of service -- a body which shall be independent of
21 executive authority, except in its selection, and free to
22 exercise its judgment without the leave or hindrance of any
23 other official or any department of the government." Id. at
24 625-626.

25 Thus, the role of the Comptroller General as described

1 in CICA is not constitutionally infirm due to the fact that it
2 exercises authority over the Executive Branch and is independent
3 of the Executive Branch.

4 Lastly, I turn to a consideration of Immigration and
5 Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), the
6 Supreme Court's last pronouncement concerning the constitutional
7 separation of powers. In Chadha, the Supreme Court held that
8 the section of the Immigration and Nationality Act authorizing
9 one House of Congress, by resolution, to invalidate a decision
10 of the Executive Branch to allow a particular deportable alien
11 to remain in the United States, is unconstitutional because the
12 action by the House pursuant to that section is essentially
13 legislative and thus subject to the constitutional requirements
14 of passage by a majority of both Houses and presentation to the
15 President.

16 In Chadha, the Court struck down the Congressional veto
17 provision because it found that it was essentially legislative
18 in purpose and effect. Chadha at 2784. "The House took action
19 that had the purpose and effect of altering the legal rights,
20 duties and relations of persons, including the Attorney General,
21 Executive Branch officials in Chadha, all outside the
22 legislative branch." Id.

23 That is not the case here. Just because the
24 Comptroller General's decision is independent of the Executive
25 Branch, it is not then necessarily legislative. Congress

1 enacted the provisions of CICA pursuant to its legislative
2 authority to study various problems in government and enact
3 statutory solutions to correct them. Once the procedures
4 outlined in CICA are enacted, however, Congress has no
5 involvement whatsoever in the procurement process.
6 Congressional influence is completely excluded from the bid
7 protest process, unlike the legislative veto procedure struck
8 down in Chadha.

9 Defendant relies largely on the legislative veto cases,
10 notably INS v. Chadha, and on Buckley v. Valeo. In these cases,
11 the Houses of Congress subjected agency operations to political
12 control. In Chadha, they did so by a resolution ordering that
13 Mr. Chadha be deported; in Buckley, by appointing commissioners
14 of the Federal Election Commission. No such political control
15 exists here.

16 Indeed, in Humphrey's Executor, the Court found it
17 appropriate for Congress to empower agencies to conduct
18 quasi-judicial and quasi-legislative activity. In this regard,
19 Buckley reaffirmed the doctrine of Humphrey's Executor.

20 I find that the facts do not bear out defendant's
21 attempt to label the Comptroller General a legislative officer
22 and call his stay function a "legislative veto." Justice
23 Cardozo's observation is entirely on point: "A fertile source
24 of perversion in constitutional theory is the tyranny of
25 labels." See Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).

1 I accordingly look past defendant's labels and find the
2 contested statute constitutional.

3 Having decided that the challenged provisions of CICA
4 are constitutional, it is clear that plaintiffs will prevail on
5 the merits of their claim that no work may go forward until the
6 Comptroller General has either ruled on the merits of
7 plaintiff's protest, or dismissed the protest in accordance with
8 31 U.S.C. Section 3551 et. seq. I therefore must turn to the
9 requirement of irreparable harm.

10 The provisions of CICA and the question of irreparable
11 harm are inextricably intertwined. I need not dwell on the
12 enormous procurement problems studied in the Congressional
13 hearings and reports spanning more than a decade, for they are
14 widely known, in large part because of those hearings. In
15 fiscal year 1983, the federal government awarded \$168 billion in
16 contracts. Although procurement statutes had long favored
17 awards through competitive methods, procuring agencies have
18 persisted in using sole-source acquisition (acquisition from a
19 single supplier, without competition), and other noncompetitive
20 methods. Of that \$168 billion "only about one-third, \$54
21 billion, was categorized as competitive." Competition in
22 Contracting Act of 1984: H. R. Rep. No. 1157, 98th Cong., 26
23 Sess. 12 (1984) ("CICA Report").

24 In deciding to enact a stay provision to give the GAO
25 time to examine protests, the House committee holding hearings

1 on CICA was very concerned with fait accompli situations where
2 the administrative agency moved ahead with its procurement, in
3 spite of the protest, thereby precluding meaningful judicial
4 review. The committee referred to two opinions in which the
5 court's ability to grant meaningful relief was limited because
6 the agencies had made the challenged awards fait accompli in the
7 time it took plaintiffs to get to the courthouse.

8 In Robert E. Deracktor of Rhoda Island, Inc. v.
9 Goldschmidt, 506 F.Supp. 1059 (D.R.I. 1980), the plaintiff filed
10 a protest with the GAO concerning a Coast Guard procurement, but
11 "before the GAO acted upon the protest, the Coast Guard executed
12 the contract with [the protester's competitor]." Id. at 1061.
13 The Court cited the procurement regulations discussed above,
14 which required that before making an award "[w]here it is known
15 that a protest against the making of an award has been lodged
16 directly with GAO," approval must be given "at an appropriate
17 level above that of the contracting officer ... [and] a notice
18 of intent to make award in such circumstances shall be furnished
19 GAO " Id. at 1061-62 (quoting regulations). The Coast
20 Guard, evidently not wanting to have an independent opinion on
21 the validity of its action, had not followed that regulation.

22 In Aero Corp. v. Department of the Navy, 540 F.Supp.
23 180 (D.D.C. 1982), the plaintiff protested to the GAO concerning
24 a Navy aircraft procurement, but the Navy proceeded in haste.
25 GAO dismiss the protest as premature. Then, before the

1 plaintiff could protest again, or seek judicial review, the Navy
2 moved ahead with its procurement, apparently trying to present
3 the GAO "with a fait accompli," Id. at 215, citing Daracktor,
4 supra. By such steps, the Navy, "besides making competition
5 impossible, made extremely dangerous any delay that might be
6 occasioned by the judicial process or GAO review." Id. at 185
7 n. 7. In effect, the Navy "had finessed plaintiff's efforts to
8 make a timely protest to the General Accounting Office, and had
9 denied plaintiff an opportunity for timely judicial review of
10 the sole-source decision as to the first 20 aircraft." Id. at
11 185.

12 The House report noted: "GAO has no power to stop a
13 contract award or contract performance while a protest is
14 pending. As a result, agencies usually proceed with their
15 contracts, knowing that they will preclude any possibility of
16 relief simply by delaying the protest process." CICA Report,
17 supra, at 24 (quoting hearing testimony). Congress' solution
18 was to enact the stay provision in 31 U.S.C. Section 3553.

19 I find, therefore, that plaintiffs have made a
20 sufficient showing of irreparable injury in light of the
21 purposes of the Act. The Act specifically provides for a stay
22 such as I am ordering to give the GAO time to review the
23 protest.

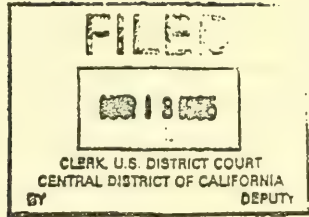
24 I note that the provisions of the Act have a built-in
25 safety valve to prevent undue harm to the United States. Should

1 the head of the procuring activity find that urgent and
2 compelling circumstances which significantly affect interests of
3 the United States be present, work can proceed on the contract
4 in spite of the protest. See 31 U.S.C. Section 3553(c)(2)(A).

5 I also find that the harm to defendant Spiniello is
6 limited at this point. They have ordered some materials for the
7 project and have organized their work plans and geared up for
8 the project, but no evidence has been presented to demonstrate
9 that any harm greater than a limited monetary investment would
10 ensue if all work were stopped.

11 I accordingly preliminarily enjoin defendants from
12 going forward with any work except in accordance with the CICA
13 provisions.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LEAR SIEGLER, INC.,
ENERGY PRODUCTS DIVISION,
a Delaware corporation,

Plaintiff,

and

THE UNITED STATES SENATE and
THE UNITED STATES HOUSE OF
REPRESENTATIVES,

Intervenors,

vs.

JOHN LEHMAN, Secretary of the
Navy (in his official
capacity) and
WILLIAM STEVENSON,
Contracting Officer (in his
official capacity)

Defendants,

and

GOVERNMENT OF ISRAEL d/b/a
ISRAEL MILITARY INDUSTRIES,

Intervenor.

No. CV 85-1125-KN

ORDER

1 The Court, having heard oral argument from counsel
2 with respect to Plaintiff's motion for a preliminary injunction,
3 and Defendant Government's motion to transfer, and having
4 considered the papers filed thereon, IT IS HEREBY ORDERED
5 THAT the Government's motion to transfer is DENIED, and
6 that the Plaintiff's motion for a preliminary injunction
7 is DENIED.

8
9 1. Defendant Government's Motion to Transfer

10
11 This Court finds that it has jurisdiction to hear
12 this matter regardless of whether this action is a pre-award
13 contract claim. The Court does recognize that other District
14 Courts have determined that 28 U.S.C. § 1491(a)(3) confers
15 jurisdiction to hear pre-award contract claims to the
16 Court of Claims to the exclusion of the District Court.
17 However, this Court chooses to follow the holding and
18 analysis set forth by the Third Circuit in Coco Brothers, Inc. v.
19 Pierce, 741 F.2d 131, 133 (3d Cir. 1984).

20 In Coco, the court examined the legislative
21 history and purpose behind § 1491(a)(3) and found it was not
22 intended to exclude the District Court from jurisdiction
23 to hear pre-award contract claims. The court cited language
24 from House Report No. 312 which stated:

25 "This enlarged authority [to the Claims
26 Court] is exclusive of the Board of
27 Contract Appeals and not to the exclusion
28 of the district court. ... It is not
the intent of the Committee to change
the existing case law as to the ability
of parties to proceed in the district court

1 pursuant to the provisions of the
2 Administrative Procedure Act in
3 instances of illegal agency action.
4 ... Nor is it the intent of the Committee
5 to oblige lawyers, litigants, and possibly
6 witnesses to travel to Washington, D.C.,
7 whenever equitable relief is sought in
8 a contact [sic] action prior to award."

9 H.R. No. 312 97th Cong., 1st Sess. 43.

10 This Court finds that such language makes it quite
11 clear that the District Court was intended to have concurrent
12 jurisdiction with the Claims Court over pre-award contract
13 claims.

14 Although rare and exceptional, there are times
15 when judicial inquiry beyond the language of a clear and
16 unambiguous statute is appropriate. In Rubin v. United States,
17 449 U.S. 424 (1980), the Supreme Court stated, "When we find
18 the terms of a statute unambiguous, judicial inquiry is
19 complete, except in 'rare and exceptional circumstances.'" Id.
20 at 430 citing TVA v. Hill, 437 U.S. 153, 187 n.33 (1978).
21 In Rubin, the Court found that such circumstances did not exist
22 because its reading of the statute in question was wholly
23 consistent with the history and purposes of the legislative
24 act at issue. Id. at 430. However, in this case,
25 judicial inquiry is certainly appropriate to assure that
26 § 1491(a)(3) is not interpreted contrary to its purpose.
27 Therefore, this Court shall follow the holding and analysis
28 of the Coco Court with respect to the jurisdiction of a
District Court to hear a pre-award contract claim.
Accordingly, the Government's motion to transfer is DENIED.

2. Plaintiff's Motion for a Preliminary Injunction

In November 1984, Plaintiff submitted a protest to the Navy concerning the applicability of the Buy American Act ("Act") [41 U.S.C. § 10(a)-(d)] requirements to the bid submitted by Israel Military Industries ("IMI"). Thereafter, the Government decided to waive the Act's requirements with respect to IMI's bid. Consequently, the contract for the external fuel tanks was awarded to IMI instead of Plaintiff.

Plaintiff alleges that the Government violated Formal Advertising Regulation ("FAR") § 14.407-8(b) by not informing Plaintiff of the decision on its protest. However, FAR § 14.407-8(b) was superseded in January 1985 by Federal Acquisition Circular ("FAC") 84-6. Significantly, Section 33.103 of FAC 84-6 does not contain a notice provision as did § 14.407-8(b). Therefore, Plaintiff's claim concerning lack of notice is essentially without merit.

Even assuming, arguendo, that § 14.407-8(b) still applies, this Court finds that Plaintiff was given sufficient notice of the Government's decision. On February 19, 1985, the contracting officer, William Stevenson, wrote a letter ("Stevenson letter") to Plaintiff stating that the contract had been awarded to IMI despite Plaintiff's protest, and that the basis for the decision was based on the urgent need for the fuel tanks. Government's Administrative Record 1.

FAC § 33.104 provides the procedure by which the Government shall handle protests made to the General

Accounting Office ("GAO"). That section provides that an agency may award or perform a contract notwithstanding a protest to the GAO if the contracting officer determines in writing that the supplies to be contracted for are urgently needed. Further, § 33.104 requires that the contracting officer shall give notice of the decision to award or perform the contract to the protester. In this case, the Stevenson letter, described above, is sufficient to meet § 33.104's notice requirement. Thus, this Court finds that the Government has complied with its own regulations with respect to the disposition of both Plaintiff's November protest to the Navy and its February protest to the GAO.

Turning to the applicable statute, the Competition in Contracting Act ("CICA"), Pub. Law 98-369, § 2741 (31 U.S.C. § 3553) provides in relevant part:

The head of the procuring activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the Federal Agency has notice under this section)-

(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General under this subchapter; and

(B) after the Comptroller General is advised of that finding.

31 U.S.C. § 3553(c)(2) (West 1984).

It should be noted that § 3553(d) contains a similar provision which authorizes the Government to perform

1 a contract despite notice of a protest which is lodged within
2 10 days of the contract award. Performance of the contract
3 may take place if the head of the procuring activity finds
4 that performance is in the best interest of the United States
5 or that urgent and compelling circumstances will not permit
6 waiting for the decision of the Comptroller General.
7 § 3553(d)(1), (2).

8 In this case, the Government has submitted a
9 sworn declaration from Vice Admiral J.B. Busey, head of
10 the procuring activity of the contract at issue. In this
11 declaration, Admiral Busey states:

12 Every day that the contract for these
13 external fuel tanks is delayed is
14 increasingly detrimental to the national
defense.

15 ... The importance of these tanks to the
national defense can not be overemphasized.

16 ... As Commander, Naval Air Systems Command,
17 I am head of the procuring activity to
18 purchase both the F/A-18's and the external
fuel tanks. The nation's urgent and
19 compelling need to have these fuel tanks
under contract increases on a daily basis.
20 In a very short period of time, Naval Air
System Command will be unable to supply
21 to the fleet F/A-18's with the necessary
operational range and the fleet will have
22 to consider what less capable aircrafts
are available to meet our combat needs
23 if we cannot use the superior F/A-18.
There are no substitutions for these
24 fuel tanks. If we are unable to quickly
resume our performance under this contract
25 for fuel tanks, the defensive posture of
the nation will be harmed.

26 Busey Declaration, pp. 45-46, Exhibit 1, Defendant's Opposition
27 to Plaintiff's Motion for Preliminary Injunction.
28

Admiral Busey's declaration makes clear that neither the award nor the performance of the contract at issue can be temporarily enjoined pending the decision from the Comptroller General. However, the Government has elected not to fully comply with the technical requirements imposed by § 3553(c) or (d) to lift the automatic stay. The Government has determined that subsections 3553(c) and (d) are unconstitutional, and therefore, compliance with the statute is not necessary. As made apparent by the hearing of this matter, the Government, despite its being able to terminate the automatic stay by simply sending Admiral Busey's declaration to the Comptroller General, has adopted this strategy in order to force a determination by this Court on the constitutionality of § 3553. However, this Court need not make such a determination. Despite the Government's lack of complete technical compliance with the CICA provision, this Court finds that the Government's submission of Admiral Busey's declaration constitutes substantial and sufficient compliance with § 3553(c)(2) or § 3553(d)(2).

As already pointed out, Admiral Busey's declaration constitutes the precise type of determination which Congress found to be sufficient for allowing the award or performance of a contract despite the existence of a protest. Further, since the Comptroller General has appeared in this action through its filing of an amicus brief, it would be incredulous to believe that the Comptroller General has not been made aware of Admiral Busey's declaration. Therefore, the Government, despite its intentions, has complied with

1 § 3553 such that a stay on the performance of the contract
2 must be lifted by operation of the statute. Resolution
3 of the constitutionality of § 3553 as sought by the Government
4 is not necessary. Moreover, this Court disapproves of the
5 Defendant Government's manipulation of a national emergency
6 situation to force a judicial determination which the
7 Government hoped would validate its constitutional analysis
8 of the statute in question.

9 Since this case presents "urgent and compelling
10 circumstances," it is not an appropriate case for resolution
11 of the constitutionality of § 3553. In North Carolina v. Rice,
12 404 U.S. 244, 246 (1971), the Supreme Court stated:

13 "To be cognizable in a federal court,
14 a suit 'must be definite and concrete,
15 touching the legal relations of parties
16 having adverse legal interests
17 It must be a real and substantial
18 controversy admitting of specific
relief through a decree of a conclusive
character, as distinguished from an
opinion advising what the law would be
upon a hypothetical state of facts.'"

19 Id. at 246, citing Aetna Life Ins. Co. v. Haworth, 300 U.S.
20 227, 240-241 (1937). If this case did not present such
21 "urgent and compelling circumstances," then it might be
22 necessary for this Court to resolve the constitutionality
23 of § 3553 since the automatic stay would not be lifted by
24 operation of the statute itself. However, that is not the
25 case here, and thus resolution of the constitutional question
26 could only be made under a "hypothetical" state of facts.
27 Therefore, this Court need not and should not determine in
28 this case whether § 3553 is constitutional.

1 The legal standards applicable to Plaintiff's
2 motion for a preliminary injunction have been set forth by
3 the Ninth Circuit:

4 "To obtain a preliminary injunction, a
5 party must show either (1) a likelihood
6 of success on the merits and the
7 possibility of irreparable injury, or
8 (2) the existence of serious questions
9 going to the merits and the balance of
10 hardships tipping in its favor."

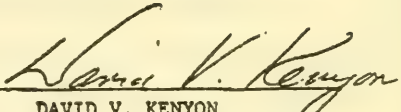
11 Apple Computer, Inc. v. Formula International, Inc., 725 F.2d
12 521 (9th Cir. 1984). It should also be noted that the
13 Ninth Circuit has stated that the dual formulations in
14 Apple Computer "are not really two separate tests, but ...
15 merely extremes of a single continuum." Benda v. Grand Lodge,
16 584 F.2d 308, 315 (9th Cir. 1978). Therefore, to succeed in
17 this motion, Plaintiff must show at least some modicum of
18 likelihood of success in terms of the propriety of a
19 preliminary injunction. Since this Court finds that the
20 Government has sufficiently complied with § 3553, Plaintiff
21 cannot meet this burden. Therefore, the motion for preliminary
22 injunction must be denied. Finally, in making this ruling,
23 this Court is not making a determination on the merits of
24 Plaintiff's protest to the GAO. The merits of that protest
25 will be considered by the GAO, whose recommendation will
26 then be submitted to the Government.

27 3. Conclusion

28 For the reasons presented above, it is hereby
ordered that both the Government's motion to transfer

1 and the Plaintiff's motion for a preliminary injunction
2 are DENIED.
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6 DATED: *March 13, 1985*
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10 DAVID V. KENYON
11 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PITNEY BOWES INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Civil Action

NO. 85-0822

FILED

MAR 13 1985

TEMPORARY RESTRAINING ORDER

JAMES E. DAVEY, Clerk

This cause having been heard on plaintiff's motion for a temporary restraining order, and the Court having considered plaintiff's complaint and plaintiff's supporting memorandum of points and authorities and the oral arguments of the parties, and it appearing to the Court after due deliberation that defendants will commit or are actually engaged in committing and will continue to commit the acts set forth below, and defendant having failed to demonstrate the basis under the Federal Acquisition Regulations for its decision; it is therefore

ORDERED that the defendants, their officers, agents, employees, attorneys and all persons in active participation with them, be and hereby are, directed to refrain from:

(a) expending any public funds for the performance of or preparation to perform U.S. Army Contract No. MDA-903-85-B-0014, awarded on February 20, 1985 to Whitaker Brothers Business Machines, Inc. and;

(b) taking any action against plaintiff which directly or incidentally impedes plaintiff's right to compete fairly for

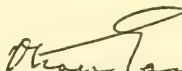
the opportunity to obtain a contract for the supplies called for in Contract No. MDA-903-85-B-0014 until this Court has an opportunity to hear plaintiff's motion for a preliminary injunction, which the Court sets for hearing on March 25, 1985 at 2:00 P.M.,

Provided that plaintiff first give security in the sum of \$1,000 for the payment of such costs and damages as may be incurred by any party who is found to have been wrongfully restrained. Security may be posted by personal check of plaintiff's counsel; and it is further

ORDERED that service of this temporary restraining order upon counsel for defendants shall be deemed service upon defendants, their officers, employees, agents and attorneys and other persons in active participation with them; and it is further

ORDERED that expedited discovery be and the same is authorized respecting any determinations by the contracting officer to authorize the supplying of reconditioned equipment and any conversations he had with any bidders.

Issued this 13th day of March, 1985 at 5:30 P.M.



Judge

United States District Court
for the District of Columbia
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JAMES F. DAVEY, CLERK
By 
Deputy Clerk

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